Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a tactical use of force to overcome resistance to a lawful arrest, which poses no significant risk of physical injury– and causes ***no*** physical injury – meets the threshold for unreasonable force under the appropriate Fourth Amendment standard?

2. Whether pre-incident decisional law may be disregarded in favor of purportedly relevant post-incident case law to satisfy the "clearly established" prerequisite to denial of qualified immunity?

PARTIES TO THE PROCEEDING

PETITIONERS

County of Humboldt, Sheriff Dennis Lewis, Chief Deputy Gary Philp, and City of Eureka.

RESPONDENTS

Molly Burton, Vernell "Spring" M. Lundberg, Michael McCurdy, Eric Samuel Neuwirth, Maya Portugal, Lisa Marie Sanderson-Fox, Jennifer Schneider, Terri Slanetz, and Noel Tendick. Headwaters Forest Defense is no longer a party to this action.

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PETITION FOR WRIT OF CERTIORARI

The County of Humboldt, the City of Eureka, Sheriff Dennis Lewis, and Chief Deputy Gary Philp petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is reported at 276 F.3d 1125, as amended. This opinion follows this Court's grant of Certiorari and Remand, 122 S.Ct. 24, and the previous decision vacated by this Court, reported at 240 F.3d 1185 (App., *infra*, 15a) which superseded and amended a prior decision reported at 211 F.3d 1121. The opinion of the District Court is published at 1998 WL 754575 (N.D. Cal.). App., *infra*, 54a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 2002. On February 25, 2002, the Court of Appeals denied petitioners' timely petition for panel rehearing and suggestion for rehearing *en banc*. App., *infra*, 13a. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a suit for damages under Title 42, United States Code section 1983, asserting excessive force in violation of the Fourth Amendment to the United States Constitution.

STATEMENT

The tactical use of force in issue – applications of pepper spray – was determined to be reasonable as a matter of law under the circumstances by the trial judge. It was authorized as within the use of force policy of the Humboldt County Sheriff's Department after extensive research, including review of Ninth Circuit decisional law, by the policy maker defendants in response to concerns expressed up the chain of command that other methods of overcoming resistance to lawful arrests at protest events posed increasingly significant risks of injury.

The nine plaintiffs are affiliated with EarthFirst!, a world-wide movement which advocates and practices criminal actions ("direct actions") to advance purported environmental causes.[1] The present litigation involves three separate "direct actions" staged in Humboldt County, California. One of the incidents occurred in the local offices of a United States Congressman.

In each of the "direct actions," plaintiffs locked themselves together with steel devices known as "black bears."[2] These devices weighed approximately twenty-five pounds and consisted of two steel cylinders welded together to form a right angle.[3] The plaintiffs attached their wrists

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[1] EarthFirst! and similar groups were involved in the World Trade Organization protests in Seattle and Washington, D.C. *See*, for example, December 13, 1999, *Newsweek*, "The Battle Of Seattle;" December 13, 1999, *Time*, Vol. 154, No. 24, "Anarchy In Seattle;" April 24, 2000, *Newsweek*, "Getting Ready For Seattle II," regarding seizure of a carload of "lock boxes" (such as the "black bears" used here), at p. 40; *and see* http://www.protest.net. These events underscore the national importance of the issues in this case.

[2] The factual background set forth below is taken primarily from the District Court's order granting judgment as a matter of law. App., *infra*, 54a, *et seq.*

[3] *See* photographs, App. *infra*, 67a ("L" shaped device second from top) and 68a (showing cross section).

inside the black bears by using a metal bracelet that is clipped to a steel rod welded into the center of the cylinders at or as close as possible to the right angle. The clip allows the user to easily and quickly disengage from the black bear at any time. Using these devices, plaintiffs linked themselves arm-to-arm for the sole purpose of resisting and delaying their lawful arrests.

Each of the three incidents were videotaped by the Humboldt County Sheriff's Department.[4] Edited portions of these videotapes were broadcast by the news media both nationally and abroad.

In the first incident, eight activists, including four of the plaintiffs, entered and occupied the offices of Pacific Lumber Company during business hours, locking themselves together in a circle using the black bear devices. In response to this intrusion, employees of the company called police, and several members of the Humboldt County Sheriff's Department responded.

The Sheriff's Department and other local law enforcement had responded to such protest incidents since 1990. In order to defeat the steel lock-down devices on previous occasions, the Sheriff's Department had developed a method of manually cutting out the activists using a Makita grinder. The Makita grinder is a power tool capable of cutting through steel.[5] The undisputed evidence at trial established that "use of such a cutting device poses a substantial risk of injury to both the locked-down protestors and the operating officer." App., *infra*, 62a.

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[4] These videotapes were admitted into evidence at trial. The videocassette of the Scotia arrests was lodged on April 30, 2001, upon filing of defendants' prior petition on which certiorari was granted on October 1, 2001.

[5] *See* App., *infra*, 68a, for a photograph depicting a black bear device cut with the Makita grinder.

As an alternative to the use of the grinder, officers on the scene determined that the tactical use of oleoresin capsicum ("OC" or "pepper spray")[6] was the safest means of effecting the arrests.[7]

After repeatedly pleading with the activists, asking them to release and warning them that if they did not comply OC would be applied, a small amount of liquid OC was applied to the outside corner of the plaintiffs'

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[6]The use of pepper spray was authorized as an option within departmental policy by the defendant policy makers after extensive research. See *infra*, fns. 9 and 10, and accompanying text. In its qualified immunity analysis, the Panel seizes upon a decision – *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) – published three years after the subject incidents involving the use of pepper spray in the arrest of a "disturbing the peace" suspect. The allegation in that case was that officers failed to alleviate its harmful effects after the arrestee was handcuffed, resistance had ceased and the custodial arrest was complete. The Panel would have a jury decide whether a policy maker is "plainly incompetent" who instead informed his decision by review of a Ninth Circuit case – *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994) – involving the tactical use of pain compliance to overcome resistance to arrest in the context of civil disobedience. The Panel did not even consider *Forrester* in its qualified immunity analysis.

[7]The Panel in *Headwaters Forest Defense vs. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002) (*"Headwaters II"*) concluded that the use of pepper spray was "unnecessary to subdue, remove, or arrest the protestors" because the defendants "had forcibly, but safely, removed hundreds of 'black bears' from protestors' arms" with the Makita grinding saw since 1990. Defendants invite the Court's attention to App., *infra*, 69a, which is a photograph from the Scotia incident showing the plaintiffs wrapping arms and legs around the black bear devices to prevent the use of this tool. It should be self-evident from this photograph that use of the electric saw would have resulted in catastrophic injuries to the plaintiffs. Another crucial fact overlooked in the decision is that the devices used by the protestors had steadily evolved over the years so that the use of the electric saw became increasingly more dangerous. App., *infra*, 67a. It was clearly demonstrated at trial that the black bears worn by plaintiffs in the Fall of 1997, which were constructed of one-quarter inch steel and weighed twenty-five

[footnote continued]

closed eyes by cotton swab. This method of application was specifically designed to minimize exposure to airways, and to the other occupants of the office building. Before OC was applied, each individual was again asked by the deputy applying it to release. Only after the individual refused to cease resisting arrest was OC applied. Ultimately, all but four of the activists voluntarily released in response to either the use of OC or the threatened use of OC. The four (in pairs) remaining activists had to be carried outside of the office building, where one pair then released and the two other plaintiffs were separated using the Makita grinder.

The next incident occurred eight days later, again on Pacific Lumber property. Two of the plaintiffs locked themselves together through the treads of a Caterpillar tractor, linking themselves with a single black bear device. The responding Sheriff's Department personnel determined that the risk of injury and fire mandated that OC be used before attempting to cut out plaintiffs. Once again, plaintiffs were repeatedly warned that if they did not release, OC would be applied. In spite of the application of OC, plaintiffs refused to release and ultimately had to be cut free from the tractor using the Makita grinder.

The third incident occurred in the offices of (former) United States Congressman Frank Riggs.[8] Four of the plaintiffs and other individuals entered the Congressman's office during business hours, deposited a tree stump and wood shavings onto the floor, and then locked themselves around the stump using the black bear devices. Again,

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pounds, had no resemblance to the bicycle locks or thin-walled and poorly constructed devices of previous years. *Id.*

[8]It was undisputed at trial this was *not* a political office. Rather, it provided constituents with assistance in accessing federal agencies. This included such matters as obtaining a temporary check through Social Security so food could be purchased and locating a life-saving pharmaceutical product through the FDA.

the responding officers determined that risk of injury and fire danger favored an initial attempt to gain compliance by application of OC. Once again, the officers repeatedly warned plaintiffs of their intention to use OC and requested that they stop resisting arrest, to no avail. OC was then applied, causing plaintiffs to eventually release from the devices.

As observed by the District Court in granting judgment as a matter of law "[plaintiffs] introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC" in any of the incidents. App., *infra,* 57a. Furthermore, in each of the incidents the deputies applied water from a spray bottle, in some cases before plaintiffs released, in order to limit the discomfort caused by the pepper spray. App., *infra,* 59a.

The undisputed evidence at trial established that prior to the use of pepper spray, officers in the field had been regularly called upon to remove activists from various mechanical devices for several years prior to the incidents in question, and voiced their safety concerns up the chain of command. The undisputed evidence established that, prior to the authorization of use of pepper spray, Chief Deputy Gary Philp, *inter alia,* consulted with a chemical agent training specialist, sought legal advice from a district attorney and county counsel, reviewed applicable case-law[9] and OC research material, and discussed the pro-

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[9] As noted earlier, one of the cases reviewed by Chief Deputy Philp was the leading case in the Ninth Circuit concerning the use of pain compliance to effect lawful arrests of activists – *Forrester v. City of San Diego.* See, *supra,* at fn. 6. In *Forrester,* anti-abortion protesters occupied the hallways of a health clinic and went limp when officers attempted to remove them. The officers then used martial arts devices ("nunchakus") on the wrists of the activists, several of whom suffered lasting physical injury, from tendon damage to a broken wrist. The Ninth Circuit upheld a jury determination that this use of force was reasonable.

posed use with other law enforcement agencies.[10]

Plaintiffs and an entity entitled "Headwaters Forest Defense" filed a complaint in Federal District Court under 42 U.S.C. §1983, alleging violations of their First and Fourth Amendment rights, and requesting injunctive relief to prohibit the use of OC by Humboldt County law enforcement on environmental activists engaged in various violations of the law. Plaintiffs' complaint named as defendants the County of Humboldt, the City of Eureka, Humboldt County Sheriff Dennis Lewis, Eureka Police Chief Arnold Millsap, Humboldt County Chief Deputy Gary Philp, Eureka Police Captain William Honsal, and other members of the Humboldt County Sheriff's Department and the Eureka Police Department. Punitive damages were sought against the individual defendants.[11]

Following a motion for summary judgment by defendants, all individual defendants were dismissed from the lawsuit based on qualified immunity, with the exception of Humboldt County Sheriff Dennis Lewis and Chief Deputy Gary Philp.

Trial commenced in San Francisco on August 10, 1998. A jury viewed the videotapes of the incidents, heard nine days of testimony, including testimony from the plaintiffs, law enforcement officers, and an expert witness regarding the use of OC to overcome resistance to arrest.

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[10] The reviewed materials included a 1997 National Institute of Justice report finding no injuries from the use of OC, in spite of the fact that it was used at a distance of less than two feet about twenty-five percent of the time by law enforcement officers in the field.

[11] Following the filing of the complaint and prior to trial, the court denied plaintiffs' application for injunctive relief. Headwaters Forest Defense requested and was granted dismissal from the suit, and plaintiffs dismissed all First Amendment claims and allegations of unlawful detention with prejudice, and dismissed all claims against several individually named defendants.

At the close of the evidence, the District Court dismissed the two remaining individual defendants, Chief Deputy Gary Philp and Humboldt County Sheriff Dennis Lewis, on qualified immunity grounds.

After deliberation the jury announced that it was deadlocked, and the court declared a mistrial. Defendants then moved for entry of judgment as a matter of law under Federal Rules of Civil Procedure, Rule 50. The court applied the balancing test in *Graham v. Connor*, 490 U.S. 386 (1989), and concluded: "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs." App., *infra*, 60a.

Plaintiffs appealed the District Court's Judgment in favor of the entity defendants on the Fourth Amendment issue, as well as the granting of qualified immunity to Sheriff Lewis and Chief Deputy Philp.

The Ninth Circuit reversed in full the decision of the District Court. *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185 (2000) (*"Headwaters I"*) App., *infra*, 15a, *et seq.*[12] The court concluded that the threshold Fourth Amendment issue was a jury question, due to "conflicting evidence." The court rejected the notion that proof of a physical injury or risk of physical injury, is a prerequisite to a viable excessive force claim. The Panel declared that the District Court "erred in focusing on the purported absence of evidence of a 'significant risk

[12] *Headwaters I* amended and superseded on denial of rehearing the Ninth Circuit's initial opinion issued eight months earlier and reported at 211 F.3d 1121. In the original publication, one Panel member called the underlying constitutional question "a close one" in a concurring opinion. This was not acknowledged in the qualified immunity analysis and was deleted from later published decisions.

of physical injury' from the use of pepper spray." App., *infra,* 34a. The Panel also rejected the notion that a significant governmental interest justified the use of pepper spray, distinguishing this Court's holding in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 287 (1993) ("The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens."). App., *infra,* 41a-44a.

Lastly, the court concluded that Sheriff Lewis and Chief Deputy Philp were not entitled to qualified immunity, concluding that "the law concerning the use of excessive force is clearly established," – even though its application in the particular factual context was "unprecedented" – because "the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment are well established." App., *infra,* 48a.

Defendants then petitioned for writ of certiorari. This Court granted certiorari, vacated *Headwaters I,* and remanded for further consideration in light of *Saucier v. Katz,* 533 U.S. 194 (2001).[13]

On remand, the Ninth Circuit refused further briefing or oral argument, and again reversed the District Court and denied a petition for rehearing and suggestion for rehearing *en banc. Headwaters Forest Defense vs. County of Humboldt,* 276 F.3d 1125 (9th Cir. 2002) (*"Headwaters II"*), App., *infra,* 1a, *et seq.*

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[13] In *Saucier v. Katz,* discussed *infra,* the Supreme Court reversed the Ninth Circuit's denial of qualified immunity in an excessive force case.

REASONS FOR GRANTING THE PETITION

As discussed below, the Ninth Circuit followed neither the letter nor the spirit of this Court's decision in *Saucier v. Katz*. The result is a decision which raises all of the concerns previously addressed by defendants in the first petition for certiorari. Indeed, the Ninth Circuit has now established law which departs even further from *Saucier* and prior decisions of this Court – expanding the boundaries of excessive force liability and the circumstances in which jury resolution is required.

As with the decision vacated by this Court, *Headwaters II* suggests that *any* use of force to overcome resistance to lawful arrest of groups engaged in civil disobedience and organized resistance, exposes law enforcement to civil liability, and establishes a standard for qualified immunity which is virtually unattainable by law enforcement officials short of trial.

The Ninth Circuit, contrary to *Saucier*, did not engage in a particularized analysis and made no determination as to the constitutional parameters for tactical use of force alternatives – leaving this as a jury question. The issue is one of vital importance to law enforcement throughout the country as departments from various jurisdictions are required to respond to protest events and discharge their sworn duties in a manner properly limited by the bounds of the Constitution, while overcoming resistance to arrest by activists by means limited only by the bounds of their imagination.[14] The effect of the Ninth Circuit decision is to instruct law enforcement to either (1) abandon alternatives such as pepper spray and revert to hands-on techniques posing known risks of injury to both the arresting officer and the non-compliant arrestee or (2) abandon

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[14] *See* App., *infra*, 67a, showing the evolution of the devices used to resist arrest.

their sworn duty to effect a lawful arrest and simply walk away.[15]

The *de minimis* nature of the force used to accomplish the arrests in this case and the absence of any injury to any plaintiff would foreclose any civil action in many circuits.[16]

It is undisputed in this case that all plaintiffs were subject to arrest as a matter of law, all resisted arrest as a matter of law, and all were taken into custody without injury. No force was used prior to urging voluntary compliance with the lawful orders and no force was used once the lawful arrests were effected. Plaintiffs developed, fabricated and employed devices to resist arrest from which plaintiffs could release at anytime, but could only be physically removed by law enforcement through use of a power tool with a grinding wheel capable of cutting steel. Lower ranking officers charged with the duty of accomplishing this task expressed concern that the devices used by protestors were becoming sturdier and the risks of injury to the arrestees and law enforcmeent officers were increasing such that it was not a matter *if* someone was going to be seriously injured, but *when*. Policy makers for the Humboldt County Sheriff's Department responded to these concerns by researching the tactical use of a chemical agent to overcome resistance to arrest and authorized this as within the use of force policy of the Department.[17] The arrests in issue were accomplished

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[15] The Ninth Circuit suggests "negotiation" as a viable alternative, see App., *infra*, 45a, but offers no guidance as to how a law enforcement officer should conduct negotiations with individuals refusing to comply with a lawful command to submit to arrest and who have indicated by words and actions an intent to delay their arrests as long as possible to garner media attention for their causes.

[16] See *infra*, pp. 17-18 and cases cited therein.

[17] Although no claim against any individual defendant of the City of Eureka survived summary judgment, the City remains a

[footnote continued]

through the tactical application of a chemical agent – a level of force which falls just above "verbal command" and below "hands on" compliance techniques in use of force policies adopted by law enforcement departments throughout this nation.

Indeed, the Commission of Police Officer Standards and Training ("P.O.S.T."), which oversees and sets standards for training and hiring practices of all law enforcement agencies in the State of California, embraced the manner of application in these incidents in training guidelines promulgated for civil disobedience responses.[18]

Finally, the Ninth Circuit in *Headwaters II* has parted company with virtually every court in the land by holding that government officials may be denied qualified immunity under the clearly established law test based on *post-incident* case law.

ARGUMENT

I.

THE DECISION BELOW HAS FAR-REACHING IMPLICATIONS CONCERNING THE BOUNDARIES OF EXCESSIVE FORCE LIABILITY.

Saucier instructs that the first question in a qualified immunity determination is the following: "Taken in the

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defendant because it is uncontroverted that the use of OC to overcome resistance to arrest in issue here is within the use of force policy of the City. In fact, defendants submit that this would be true with respect to the policy of virtually every department in the United States, and underscores both the reasonableness of the challenged use of force and the importance of granting certiorari in this case.

[18]The Panel in *Headwaters II* inexplicably announces that "regional and state-wide police practice and protocol clearly suggests that using pepper spray against nonviolent protestors is ex-

[footnote continued]

light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz, supra,* 533 U.S. at 201. As the Court explains, addressing the threshold constitutional question permits courts to establish constitutional boundaries and precedent:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case. *Id.* at 201.

This Court further emphasized that courts should be wary of sending an excessive force case to a jury based on disputes of material fact: "[T]o deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' " *Id.* at 202; see also, *Id.*, at 212, fn.3 (Ginsburg, J. concurring) ("[d]isputed versions of the facts alone are not enough to warrant denial of [judg-

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cessive." App. *infra,* 11a. The Panel does not identify or otherwise explain to what "police practice and protocol" it is referring. There was absolutely no evidence presented at trial that *any* law enforcement agency – nor even a single competent law enforcement officer – considered the tactical use in this case excessive force.

ment as a matter of law].") (quoting *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994).[19]

A dissenting Justice in a recent Ninth Circuit decision in which the majority reversed judgment as a matter of law granted in favor of law enforcement officials urged consideration of this policy:

> The lesson we glean from *Saucier* is that district courts should be more active in terminating litigation as early as possible so that officers who are protected by qualified immunity do not have to sit through an entire jury trial when there is no evidence that they committed a constitutional violation. *Santos v. Gates*, 287 F.3d 846, 856 (9th Cir. 2002), (Tallman, R. dissenting.)

Ignoring this Court's instructions in *Saucier*, the Panel in *Headwaters II* again side-steps the constitutional question and proceeds directly to the second inquiry in the qualified immunity analysis, i.e., whether the right alleged to be violated was clearly established. App., *infra*, 8a.[20]

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[19] While these quotations come from summary judgment cases, they would apply with even greater force to judgment as a matter of law, where the trial court is "freer to direct a verdict" because the court has a "better basis on which to determine the existence of material issues." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 772 (9th Cir. 1994).

[20] The Panel claims that avoidance of the constitutional question in *Headwaters II* is "consistent with" *Saucier*'s two-step approach because the constitutional question was addressed in *Headwaters I*. App., *infra*, 9a. The Panel's reasoning is incorrect for two reasons. First, *Headwaters I* has been vacated. 122 S.Ct. 24. Indeed, prior to this Court's remand order in the present case, the court in *Jackson v. City of Bremerton*, 268 F.3d 646 (9th Cir. 2001) recognized that the analysis employed in *Headwaters I* "was specifically rejected by the Supreme Court in *Saucier*", and questioned whether the decision "remains good law in this Cir-

[footnote continued]

Consistent with this Court's instructions in *Saucier* and prior cases, the District Court addressed and resolved the issue of whether the use of force in question was objectively reasonable under the Fourth Amendment. App., *infra*, 59a-65a. The Court applied the balancing test established by this Court in *Graham v. Connor, supra*, 490 U.S. 386, and concluded that: "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs." App., *infra*, 60a.

The District Court had concluded that the absence of any physical injury, or evidence of risk of physical injury concerning the subject use of OC was a significant factor in determining whether the force used was reasonable under the *Graham* analysis:

> . . . the severity of the intrusion upon the arrestee's personal integrity was minimal. The officers did not threaten or use deadly force or even employ a significant level of physical force. Rather, the force used was merely the infliction of transient pain without significant risk of physical injury. In fact, plaintiffs failed to introduce any evidence that the use of cotton swabs to apply OC posed any risk of injury.[21]

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cuit." *Id.* at p. 652, fn. 3. Second, as also recognized in *Jackson*: "We did not decide whether the use of pepper spray constituted excessive force in [*Headwaters I*]. Instead, we considered whether the district court erred in directing a verdict for the municipal defendants in light of the evidence in the record." *Ibid.* As noted, *supra*, this Court in *Saucier* instructs against avoidance of the constitutional issue based on supposed factual discrepancies. Furthermore, in this case, unlike most excessive force cases which turn on the credibility of differing eyewitness accounts, each use of force was documented on videotape – leaving no actual material dispute for jury resolution.

[21] App., *infra*, 60a.

The Ninth Circuit rejected this reasoning, stating that "the District Court erred in focusing on the purported absence of evidence of a 'significant risk of physical injury' from the use of pepper spray." App., *infra*, 34a. The court determined that Fourth Amendment jurisprudence is "well settled" that a plaintiff may recover "nominal damages without proof of actual injury" on a claim of excessive force. *Id.*

Thus, *Headwaters* stands for the proposition that force which requires no direct contact between the officer and the arrestee and which involves no physical injury or even risk of physical injury to the arrestee – and which is used to overcome resistance to lawful arrest – may be found to be unreasonable under the Fourth Amendment.

The Ninth Circuit is at odds with the decisions of this Court and other circuits.

This Court "has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it [citation]." *Graham v. Connor, supra*, 490 U.S. at 396. " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' [citation] violates the Fourth Amendment." *Id.* Indeed, the use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing resistive individuals suspected of committing crimes. *Rodrigquez v. Farrell*, 280 F.3d 1341, 1351 (11th Cir. 2000).

This Court's analysis in *Saucier* is again instructive. The plaintiff in *Saucier* claimed excessive force based on officers "half-dragging" him to a police van and violently shoving him inside, causing him to fall to the floor of the van, where he caught himself "just in time to avoid injury." 533 U.S. at 198. While this Court in *Saucier* was

unable to rule on whether the force used violated the Fourth Amendment, due to procedural restraints,[22] Justice Kennedy, writing for the majority, "thought it was doubtful that the force used was excessive." *Id.* at 208. And in *Saucier,* unlike the present case, there was a factual dispute as to whether the plaintiff was resisting arrest. *Id.* at 212, fn. 3.

A substantial number of lower courts have concluded that instances of minimal force that do not result in actual or significant injury do not state a Fourth Amendment excessive force claim. In *Foster v. Metropolitan Airport Comm'n,* 914 F.2d 1076 (8th Cir. 1990), the Eighth Circuit held that the officers' use of force after they successfully pulled the plaintiff from the car did not give rise to a constitutional claim of excessive force under the Fourth Amendment, even though the plaintiff testified that he was pushed against a wall twice on the way to the holding area, given his further testimony that he sustained no injury as a result of being pushed. *Id.,* at p. 1082. Similarly, in *Randles v. Gregart,* 965 F.2d 90 (6th Cir. 1992), the Sixth Circuit held that the modest force exerted, which resulted in no injury, was objectively reasonable. *Id.* at p. 92. In that case, plaintiff had refused to give deputies his gun, which he was using to hunt illegally on his property. *Ibid.* Lack of injury may be an important factor even when deadly force is threatened. See, *Sharrar v. Felsing,* 128 F.3d 810 (3d Cir. 1997). In *Sharrar,* police officers required the arrestees to lie face down in the dirt, with guns to their heads, and made threats. *Id.* at p. 821. The court held that even though these actions caused discomfort and humiliation,

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[22]The Court concluded it could not decide the constitutional question "because of the limits imposed upon us by the questions on which we granted review. . ." *Id.* at 207-208.

they were still objectively reasonable. *Ibid. See also, Wilson v. Williams,* 83 F.3d 870 (7th Cir. 1996) (in due process case, proper for jury to consider extent of injury, need to apply force, relationship between force used and need for force, threat reasonably perceived by official, and efforts made to temper severity of a forceful response); *Joos v. Ratliff,* 97 F.3d 1125, 1126 (8th Cir. 1996) (per curiam) (*"de minimis"* amount of force in effecting an arrest would be insufficient to create a constitutional issue); *Lester v. Chicago,* 830 F.2d 706, 714 (7th Cir. 1987) (pre-*Graham* case holding that plaintiff failed to state a Fourth Amendment excessive force claim when, during course of arrest for disturbing peace, plaintiff was kneed in the back, threatened with being struck, dragged down a hallway, and handcuffed tightly, causing bruises on her wrists); *Azeem v. Town of Bethel,* 2000 WL 1838329 (D.Conn., Sept. 27, 2000) (recognizing the importance of injury requirement in an excessive force case).

While most courts recognize the relevance of the amount of force used and degree of injury, the Eleventh Circuit has adopted a *per se* rule that "application of *de minimis* force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." *Nolan v. Isbell,* 207 F.3d 1253, 1257 (11th Cir. 2000); see also, *Wilkerson v. Hester,* 114 F.Supp.2d 446, 463 (W.D. N. Car. 2000) ("More than *de minimis* injury is essential to moving forward to a jury a claim under the fourth amendment for excessive use of force." – citing *Nolan.*)

Recently, the Sixth Circuit also adopted a *per se* rule with respect to excessive force claims involving the use of handcuffs. In *Neague v. Cynkar,* 258 F.3d 504 (6th Cir. 2001) the court held that "when there is no allegation of physical injury, the handcuffing of an individual

incident to a lawful arrest is insufficient as a matter of law to state a claim for excessive force under the Fourth Amendment." *Id.* at p. 508. Accord, *Kain v. Nesbitt,* 156 F.3d 669, 672 (6th Cir. 1998) (no excessive force as a matter of law in handcuffing claim unless plaintiff suffered some physical injury. . .).

Other courts have held that, at a minimum, officers are entitled to qualified immunity under the principle of *de minimis* or minimal use of force involving no physical injury to the plaintiff. See, *Gold v. City of Miami,* 121 F.3d 1442, 1446-1447 (11th Cir. 1997), ("[T]he minor nature of this injury reflects that minimal force was used to apply the handcuffs. Certainly these circumstances would not 'inevitably lead' a reasonable officer in the officers' positions to conclude that the force used to apply the handcuffs was unlawful."); *Williams v. Bramer,* 180 F.3d 699, 703-704 (5th Cir. 1999) ("[W]e do require a plaintiff asserting an excessive force claim to have 'suffered at least some form of injury,' . . . . When the force used is insufficient to satisfy the legal standard necessary for recovery, the amount of force is *de minimis* for constitutional purposes.").

II.

THE NINTH CIRCUIT'S CONCLUSION THAT CONTROLLING CASE LAW ACTUALLY CONSIDERED BY THE DEFENDANTS MAY BE DISREGARDED AND THAT POST-INCIDENT AND MATERIALLY DIFFERENT CASE LAW CAN DEFINE CLEARLY ESTABLISHED RIGHTS UNDERMINES THE DOCTRINE OF QUALIFIED IMMUNITY AND IS IRRECONCILABLE WITH THIS COURT'S REMAND ORDER, PRIOR DECISIONS OF THIS COURT, AND A CONSISTENT BODY OF LAW IN THE CIRCUIT COURTS.

In *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), this Court announced a fundamental change in the scope and

application of qualified immunity when it replaced the subjective "good faith" standard with an objective standard, focusing on the state of the law at the time of the constitutional violation:

> . . . the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. *Id.* at 818.

In *Anderson v. Creighton,* 483 U.S. 635 (1987), the Court further clarified that immunity may not be denied simply because "the relevant 'legal rule' " was "clearly established" at a high "level of generality." *Id.* at p. 639. Rather,

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable officer would understand that *what he is doing* violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citation] but it is to say that in the light of pre-existing law the unlawfulness must be apparent. [citation] *Id.*, at 640. (emphasis added).

This Court further explained the nature of the "clearly established" immunity standard in *United States v. Lanier,* 520 U.S. 259 (1997). In that case, the Sixth Circuit overturned a defendant's conviction for violating 18 U.S.C. §242, the criminal counterpart of section 1983.

The court explained: "[T]he object of the 'clearly established' immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying section 242 . . . the qualified immunity standard is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.*, at 270-271.

This Court in *Saucier* reiterated that the protection of qualified immunity should not be lost unless the official has fair notice that what he or she is doing violates the law. Thus, in an excessive force case, "[q]ualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force' [citation], and to ensure that before they are subjected to suit, *officers are on notice their conduct is unlawful.*" 533 U.S. at 206, (*emphasis added*). Accordingly, the Court in *Saucier* concluded that the officer was entitled to qualified immunity, given the lack of "any case demonstrating a clearly established rule prohibiting [the officer] from acting as he did. . ." *Id.* at 209.

A. Disregarding All Of The Above Precedent, The Ninth Circuit In *Headwaters II* Completely Ignores Relevant Pre-Incident Law And Instead Concludes That Post-Incident (And Dissimilar) Law Puts Government Officials On Notice Of Clearly Established Rights.

The particular facts in *Headwaters* highlight the significance of the 'clearly established' requirement and the gravity of the Ninth Circuit's holding. Prior to adopting the OC alternative, the undisputed evidence established that law enforcement officials consulted with a district

attorney, a deputy district attorney, county counsel, a county risk manager, read professional studies concerning the use of OC and reviewed applicable case law involving the tactical use of force to overcome resistance to arrest. At the time of the incidents, the controlling authority on the use of force on non-compliant activists in the Ninth Circuit was *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994). In *Forrester*, the plaintiffs suffered lasting physical injury from tendon damage to a broken wrist, following the use of nunchakus (a martial arts device) by arresting officers. *Id.*, at 814. The plaintiffs in *Forrester* were true "passive resisters" – that is, they resisted arrest simply by going limp. Under those facts, the Ninth Circuit applied the factors announced in *Graham v. Connor*, 490 U.S. 386, and held that the use of the pain compliance devices did not constitute unreasonable force. *Id.* at 807. See also, *Monday v. Oullett*, 118 F.3d 1099, 1104-1105. (6th Cir. 1997) (full burst of pepper spray to face of non-compliant and non-combative plaintiff to avoid risk of injury and further delay "did not constitute excessive force" as a matter of law).

Law enforcement officials also had the benefit of a 1997 National Institute of Justice report on the use of OC, which documented no injuries from the use of OC. It was also undisputed that officials consulted with a chemical agents trainer, who confirmed no significant health risk associated with OC, and that its effects are limited to short-term discomfort and irritation.[23]

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[23]This is confirmed by a viewing of the videotape interview of plaintiff "Spring" Lundberg taken shortly after the application of OC. As seen in the videotape, there are no indications that Ms. Lundberg was suffering any ill-effects whatsoever at the time of the interview. See Videotape II lodged with court on April 30, 2001.

In other words, defendants here did everything they were advised to do by the courts: reviewed the particular use of force in light of current case law, regulations, and legal opinion to establish that no 'clearly established' law was being violated.

Ignoring all of the above – as well as this Court's pronouncements in *Saucier v. Katz*, *Harlow v. Fitzgerald*, *Anderson v. Creighton*, *inter alia*, regarding the qualified immunity standard – the Ninth Circuit in *Headwaters II* inexplicably concludes that Sheriff Lewis and Chief Deputy Philp are to be denied qualified immunity, based on an appellate decision rendered *after* the incidents in question, and which has no factual similarity to the use of force in question: That is, in holding that plaintiffs' rights were clearly established with respect to the use of pepper spray, the *only* case relied on by the Panel is *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000) – a case decided three years *after* the incidents in question.[24]

In *LaLonde*, two police officers entered plaintiff's apartment investigating a disturbance call and then used pepper spray to subdue the plaintiff after a "scuffle" occurred. Unlike *Headwaters*, the issue in *LaLonde* was *not* the initial use of pepper spray, but the defendants'

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[24] Following defendants' petition for *en banc* review (and presumably in response to the petition), the Panel amended *Headwaters II* in an apparent attempt to correct this mistake. See App., *infra*, 2a (inserting the phrase "when determining that the law had been clearly established by a date that is prior to the time the pepper spray was used on the protesters"). However, reliance on *LaLonde* as ostensible *notice* to the defendants is made clear elsewhere in the opinion: "We are not prevented from denying defendants qualified immunity merely because no prior case prohibits the use of the precise force at issue in this case. In the first instance, the circumstances of *LaLonde*, although not identical to those in this case, are 'not distinguishable in a fair way from the facts presented in the case at hand' such that their results should be different.' " 276 F.3d at 1131 – citing *Saucier*, 533 U.S. at 202.

failure to wash the pepper spray from the plaintiff's face *after* his resistance had completely ceased, and after the custodial arrest was complete. *Id.* at 960-961.[25] In contrast, the sole issue in *Headwaters* is the tactical use of pepper spray to *gain compliance* over individuals who were resisting arrest, i.e., refusing to voluntarily release from the black bear devices, and who were engaged in a continuing violation of the law, i.e., trespass and delaying law enforcement officers.

Disregarding that *LaLonde* could not possibly have given fair notice in a factual sense to the defendants that the subject use of pepper spray was unconstitutional – the Ninth Circuit's conclusion that post-incident case law constitutes clearly established law is irreconcilable with this Court's remand order, with the entirety of federal decisional law, and with common sense. See, e.g., *Anderson v. Creighton,* 483 U.S. at 638 (whether government action is entitled to qualified immunity is "assessed in light of the legal rules that were 'clearly established' at the time it was taken" – *citing Harlow v. Fitzgerald,* 457 U.S. at 818; *Conn v. Gabbert,* 526 U.S. 286, 290 (1999) ("[A] court must first determine whether the plaintiff has alleged the deprivation of an actual Constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." – citing *Siegert v. Gilley,* 500 U.S.

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[25] In *LaLonde,* the officers let the plaintiff sit on his couch for 20 to 30 minutes after he was handcuffed, during which time he was complaining that the handcuffs were cutting off his circulation and that his eyes and face were "on fire." (*Id.* at 960-961.) In the present case, deputies applied water from a spray bottle to the faces of the plaintiffs within seconds of compliance (and in some cases *before* compliance). Indeed, one plaintiff in a videotaped interview provided to an environmental group acknowledged that water was applied within a few minutes – even though she failed to submit to lawful arrest – and this greatly "ameliorated" the discomfort. See Videotape II, lodged with Court.

226, 232-233 (1991)); *Wood v. Ostrander,* 879 F.2d 583, 591 (9th Cir. 1989) (To determine whether defendant's conduct violated clearly established law, "we must 'survey the legal landscape' as it existed [on the date of the incident] to determine whether it had been clearly established at that time that [defendant's] alleged conduct violated [plaintiffs'] liberty interests under the Constitution.")

Accordingly, courts of virtually all jurisdictions have consistently and expressly refused to consider post-incident case-law in determining the availability of qualified immunity. *Schechter v. City of New York,* 79 F.3d 265, 271 (2nd Cir. 1996) (Case decided after the conduct in question occurred "could not possibly have provided defendants-appellants with notice regarding the lawfulness of their conduct."); *Belcher v. City of Foley, Alabama,* 30 F.3d 1390, 1400, fn. 9 (11th Cir. 1994) (post-incident case "could not have clearly established the law at the time of the conduct in this case."); *Baxter v. Vigo County School Corporation,* 26 F.3d 728, 738, fn. 7 (7th Cir. 1994) (Case cited by plaintiff "is not relevant to our inquiry because it was decided after the allegedly unconstitutional actions."); *Hansen v. Soldenwagner,* 19 F.3d 573, 578, fn. 6 (11th Cir. 1994) (Concluding that none of plaintiff's citations show that the defendants violated clearly established law because the case law "was decided after the events underlying this case and, thus, was not pre-existing law."); *Hidahl v. Gilpin County Dept. of Soc. Serv.,* 938 F.2d 1150, 1155 (10th Cir. 1992) ("A defendant in a Section 1983 action is not required to anticipate changes in the law, and the reasonableness of his conduct is to be judged by the state of the law at the time of his conduct." – citing *Harlow*); *Stewart v. Donges,* 915 F.2d 572, 581 (10th Cir. 1990) (In determining clearly established rights "we may consider only those decisions de-

cided prior to the allegedly unlawful arrest of plaintiff."); *Cygnar v. City of Chicago*, 865 F.2d 827, 846 (7th Cir. 1989) (Rejecting post-incident case law in light of *Harlow's* holding that "[if] the law at that time [of the official's actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."); *McCall v. Williams*, 52 F.Supp.-2d 611, 622 (D.S. Car. 1999) (Post-incident case cited by plaintiff regarding use of handcuffs is of "no avail because the case was decided after the incident involved in this case, and so the law could not have been 'clearly established' at the time [defendant officer] allegedly used excessive force in applying the handcuffs.").

Qualified immunity serves the critically important function for law enforcement of allowing officers to act in reasonable good faith without having to worry that courts later will dissect their decisions and conclude that there was a better course of action than the one chosen. A police officer's effective and safe discharge of his or her duties often depends on the ability to take reasonable steps to exert control of an arrest situation "with independence and without fear of consequences." *Harlow, supra*, 457 U.S. at 819.

The opinion below severely undermines the doctrine of qualified immunity by unfairly permitting loss of this protection without notice of clearly established law existing at the time of the conduct in question. As recently explained by the *en banc* court in *Marsh v. Butler County, Ala.*, 268 F.3d 1014 (11th Cir. 2001), a "fair and clear warning" requirement is the cornerstone of qualified immunity:

> The defense of qualified immunity bars absolutely a judge and jury from making, in effect, new law for a

> case to fit the particular circumstances that faced the public official at the time of the pertinent event and then applying this new law basically retroactively in the case to make an award of damages. If a public official is to be punished by an imposition of damages against him personally, the punishment must be for violating some clear, legal duty that he – in the light of the specific circumstances before him – plainly already had at the time of the pertinent event, and not for violating what is, in effect, some new legal duty recognized or announced by the judge and jury in the official's trial, long after the time of the pertinent event. *Id.*, at 1032, fn. 9.

The Ninth Circuit's decision in *Headwaters II* expressly permits this "retroactive" penalty by charging the defendants with notice of post-incident and materially different case law.

B. Granting Review Will Also Permit Resolution Of A Conflict Among The Circuits Concerning Application Of The Clearly Established Right Standard.

Since the announcement by the Court in *Harlow* that qualified immunity must be decided by clearly established rights, there has been considerable disagreement and confusion among the circuits as to how precisely the right must be defined in order to determine whether the right was clearly established at the time of the challenged conduct.[26]

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[26] See generally, Avery, Rudoovsky & Blum, *Police Misconduct – Law and Litigation*, (3rd Ed. 2000) (WestGroup), Sections 3:6, 3.7, pp. 3-27 to 3-40; See also, *People of Three Mile Island v. Nuclear Regulatory Comm.*, 747 F.2d 139, 144 (3rd Cir. 1984) ("The 'clearly established' standard poses at least two ambiguities. First. . . . lower courts are not informed whether two conflicting

[footnote continued]

At one end of the spectrum, the Eleventh Circuit has interpreted *Harlow* (and *Anderson*) as follows[27]:

> For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.[28]

In the context of an excessive force claim, the Eleventh Circuit has concluded that, because no bright line exists for identifying when force is excessive, a defendant is usually entitled to qualified immunity unless a "controlling and materially similar case declares the official's conduct unconstitutional . . ." *Prister v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). The only exception to this rule is when a plaintiff shows "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlaw-

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opinions from different district courts, or even a split decision in the court of appeals, makes the law sufficiently unclear to mandate the granting of immunity. . . . The second, and more difficult, uncertainty in employing the 'clearly established' standard involves the determination of how close a factual correspondence is required between applicable precedents and the case at issue."); *Nix. v. Avatt*, 850 F.Supp. 455, 458 (S.D. Car. 1994) ("There has been much confusion among circuits as to when a right is clearly established.")

[27] See, *White v. Bd. of Trustees of Univ. of Alabama*, 31 F.Supp.2d 953, 954 (N.D. Ala. 1999) ("The Eleventh Circuit leads the parade when it comes to the recognition of 'qualified immunity' as virtually perfect insulation for individuals from section 1983 liability.")

[28] *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994) (*en banc*); See also, *Hope v. Pelzer*, 240 F.3d 957, 982 (11th Cir. 2001) (Granting qualified immunity to defendants because "in 1995 . . . there was no case law in this circuit with facts and legal analysis clear enough to serve as a bright-line rule establishing this violation. . .")

fulness of the conduct was readily apparent to the official, notwithstanding the lack of case law. . ." *Id.* at 926; See also, *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (". . . preexisting law must give real notice of practical value to government officials, considering the specific circumstances confronting them, and not just talk of some generalized, abstract intellectual concept.")

Other circuits are in agreement that the clearly established test requires that a plaintiff, in all but the highly unusual case, show that factually similar decisional law put defendants on notice that the particular conduct in question was unlawful. See, e.g., *Thompson v. Upshur County, Tex.*, 245 F.3d 447, 460, 463 (5th Cir. 2001); *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001); *Norwood v. Bain*, 166 F.3d 243, 252 (4th Cir. 1999); *Winfield v. Bass*, 106 F.3d 525, 531 (4th Cir. 1997) (*en banc*).

On the other end of the spectrum lies the Ninth Circuit, which has repeatedly instructed against defining clearly established rights too narrowly. Thus, in *Kelley v. Borg*, 60 F.3d 664 (9th Cir. 1995), the court denied qualified immunity to correctional officers because it was 'clearly established' that, under the Eighth Amendment and *Estelle v. Gamble*, 429 U.S. 97 (1976) that prisoners have a right "to officials who are not 'deliberately indifferent to serious medical needs.' " *Id.* The court rejected defendants/appellants' argument that the lower court had defined the right too broadly: "To hold that the magistrate judge should have defined the right at issue more narrowly, and included all the various facts that appellants recited in their proposed definition, would be to allow appellants, and future defendants, to define away all potential claims." *Id.; accord, Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Carnell v. Grimm*, 75 F.3d 977, 979 (9th Cir. 1996); *See also, Feist*

v. Simonson, 222 F.3d 455, 465 (8th Cir. 2000), overruled on other grounds in *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001), ("This court employs a flexible standard in determining whether a right is cleary established. . . ."); *LaBounty v. Coughlin*, 137 F.3d 68, 74 (2nd Cir. 1998) (defining clearly established right "to be free from deliberate indifference to serious medical needs. . ."); *Martin v. Heideman*, 106 F.3d 1308, 1312-1313 (6th Cir. 1997) (defendants denied immunity from claim of "excessively forceful handcuffing" because law clearly established that use of excessive force is unconstitutional); *Murrell v. School Dist. No. 1, Denver*, 186 F.3d 1238, 1251 (10th Cir. 1999) ("We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Rather, we require parties to make reasonable applications of the prevailing law to their own circumstances.")

Granting certiorari would allow this Court to resolve the wide disparity between the circuits on the important question: when is the law sufficiently clear to put a defendant government official on notice that a federal right will be violated?

CONCLUSION

For all the above-stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-17250
D.C. No. CV-97-03989-VRW

HEADWATERS FOREST DEFENSE,

Plaintiff,

and

MOLLY BURTON; VERNELL "SPRING" M. LUNDBERG; MICHAEL McCURDY; ERIC SAMUEL NEUWIRTH; MAYA PORTUGAL; LISA MARIE SANDERSON-FOX; JENNIFER SCHNEIDER; TERRI SLANETZ; NOEL TENDICK,

Plaintiffs-Appellants,

v.

THE COUNTY OF HUMBOLDT, a political subdivision of the State of California; HUMBOLDT COUNTY SHERIFF'S DEPARTMENT; DENNIS LEWIS, Sheriff; GARY PHILIP, Chief Deputy; MARVIN KIRKPATRICK, Deputy; JOHN SYLVIA, Deputy; CIARBELLINI, Sgt.; CITY OF EUREKA, a political division of the State of California; EUREKA POLICE DEPT; BILL HONSAL, Captain; JAMES MANOS, Sgt.,

Defendants-Appellees.

ORDER AND AMENDED OPINION

On Remand from the United States Supreme Court

Filed January 11, 2002
Amended January 30, 2002

Before: Myron H. Bright,[1] Harry Pregerson, and William A. Fletcher, Circuit Judges.

Opinion by Judge Harry Pregerson

COUNSEL:

Mark Hughes, Denver, Colorado, for the plaintiffs-appellants.

Nancy K. Delaney, Eureka, California, for the defendants-appellees.

Margaret C. Crosby, for amicus curiae, American Civil Liberties Union Foundation of Northern California.

ORDER

The opinion filed January 11, 2002, is amended as follows:

1) The second sentence in the first full paragraph on slip opinion p. 552 should read as follows:

> As we noted in *LaLonde* – when determining that the law had been clearly established by a date that is prior to the time the pepper spray was used on the protestors – "any reasonable

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[1] Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

officer would know that . . . a refusal without cause to alleviate [pepper spray's] harmful effects constitutes excessive force."

2) A sentence should be added at the end of the paragraph that ends on the second line of slip opinion p. 553. The additional sentence should read:

The law regarding a police officer's use of force against a passive individual was sufficiently clear clear at the time of the events at issue in this case that the defendants cannot claim qualified immunity on the ground that they made a reasonable mistake of law. *See Saucier,* 121 S.Ct. at 2158.

OPINION

PREGERSON, Circuit Judge:

Nine environmental activists and an environmental group brought this action, under 42 U.S.C. §1983, against the County of Humboldt, the Humboldt County Sheriff's Department, Eureka City and its police department, and several individual officers, alleging that the officers' use of pepper spray on the activists' eyes and faces during three peaceful protests constituted an excessive use of force in violation of their Fourth Amendment rights. We previously issued an opinion, which is reported at 240 F.3d 1185 (9th Cir. 2001), in which we reversed the district court's decision to grant summary judgment on qualified immunity grounds to Humboldt County Sheriff Dennis Lewis ("Lewis") and Chief Deputy Sheriff Gary Philip ("Philip"), the defendants who initially authorized the use of the pepper spray on the nonviolent protestors. We also reversed the district court's decision to enter judgment in favor of Humboldt

County, the City of Eureka, and their respective police departments following trial and a hung jury.

The Supreme Court granted certiorari, vacated our judgment, and remanded this case to us for further consideration in light of *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 1251, 150 L.Ed.2d 272 (2001), in which the Supreme Court describes the way in which to proceed when state officials assert qualified immunity in a § 1983 excessive force action. Having reviewed the facts and circumstances of this case in light of *Saucier*, this panel reaffirms its conclusion that Lewis and Philip are not entitled to qualified immunity.[2]

I. Background.

The facts of this case can be found in our prior opinion, at 240 F.3d 1191-96, and are repeated here only to the extent necessary to undertake the qualified immunity analysis "in light of the specific context of the case," *Saucier*, 121 S.Ct. at 2156.

During three nonviolent protests against the logging of ancient redwood trees in the Headwaters Forest, plaintiffs-appellants ("protestors") linked themselves together with self-releasing lock-down devices known as "black bears." A "black bear" is a cylinder with a rod or post welded into the center. The protestors placed their arms into the steel cylinders and attached steel bracelets worn around their wrists to the center rods or posts in the "black bears" by using mountain climbers' carabiners. When in place, the devices immobilized their arms and

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[2]The Supreme Court's remand does not require us to reconsider our decision to reverse the district court's entry of judgment in favor of Humboldt County, the City of Eureka, and their respective police departments.

prevented their separation, although the protestors could disengage themselves from the devices by unclipping the carabiners from inside the cylinders. From 1990 until the fall of 1997, defendants had forcibly, but safely, removed hundreds of "black bears" from protestors' arms by cutting the cylinders with a hand-held electric grinder.

Beginning in the fall of 1997, defendants began using oleoresin capsicum aerosol ("OC" or "pepper spray") to cause the protestors to release themselves from the "black bears." The use of pepper spray under these circumstances was entirely unprecedented: in California, its use was "limited to controlling hostile or violent subjects" and it had never been used in Humboldt County, the State of California, or anywhere in the country against nonviolent protestors.

At issue in this case are three protests that occurred in the fall of 1997, in which defendants used pepper spray on the protestors, and then refused to give them water to wash out their eyes, in order to force the protestors to release themselves from the "black bears."

During the first protest, held indoors at the headquarters of the Pacific Lumber Company, seven protestors were linked together with "black bears." Officers from the Humboldt County Sheriff's Department warned that pepper spray would be used if the protestors did not release. After the protestors refused to release, the officers forced four of the protestors' heads back and applied pepper spray with a Q-tip to the corners of their closed eyes. The three protestors who had not received the pepper spray voluntarily released. The officers then reapplied the pepper spray with Q-tips to the eyelids of the four protestors who remained in the "black bears." The four protestors still did not release. Twenty minutes

after the pepper spray was first applied and six minutes after its second application, the officers sprayed water into the eyes of the four protestors to dilute the pepper spray, continuing to do so periodically for more than an hour. Thereafter, the officers carried the four protestors out of the building on stretchers. It took two officers just six minutes to carry the protestors out of the building. Once outside the building, one pair of protestors voluntarily released. An officer used an electric grinder to extricate the other pair from the "black bears." It took ten minutes to remove the device by grinder. No pain or injury was inflicted on the protestors by the grinder.

During the second protest, outdoors on Pacific Lumber Company property, two pairs of protestors, also linked together with "black bears," were warned that pepper spray would be used if they did not release. Two of the protestors released themselves from the "black bears" and two refused. An officer then applied the pepper spray with a Q-tip to the corners of the closed eyes of the protestors who remained in the "black bears." Despite the protestors' pleas for water to flush the pepper spray out of their eyes, one of the officers can be heard on videotape saying that they will only be given water if they release and that the pain will only get worse in thirty seconds when he sprays pepper spray in their faces. A minute later, the officer sprayed pepper spray directly into both of the protestors' faces in short full bursts from inches away. Five minutes later, the protestors again refused to release. Thereafter, officers sprayed water from hand-held spray bottles into the protestors' faces and used an electric grinder to cut the protestors out of the "black bears." No pain or injury was inflicted by the grinder.

In the third protest, four protestors linked themselves together in a Congressman's office using "black bears." After officers warned the protestors that pepper spray would be used if they did not voluntarily release, the officers pulled back each of the protestors' heads and applied pepper spray to their eyes with a Q-tip. One protestor, who was a minor, testified at trial that one of the officers pried open her eyes and applied pepper spray directly on them. Seven minutes after the initial application of pepper spray, one of the officers told the protestors that water would be provided if the protestors released themselves from the "black bears." Two of the protestors released and two remained attached to each other. One officer then stood within a foot of one of the two attached protestors and sprayed pepper spray directly at her face. Within three minutes, the remaining two protestors released. The officers then offered water from spray bottles to wash the pepper spray off the protestors' faces.

The district court granted summary judgment on qualified immunity grounds in favor of all individual defendants except for Lewis and Philip. At the close of plaintiffs' case-in-chief, the district court ruled that Lewis and Philip were also entitled to qualified immunity and dismissed the case against them. The jury deadlocked on the remaining claims against Humboldt County, the City of Eureka, and their respective police departments. The district court declared a mistrial and set a new trial date. Eight weeks later, the district court reversed itself and granted Humboldt County, the City of Eureka, and their respective police departments judgment as a matter of law.

II. Analysis.

Under the qualified immunity doctrine, "government officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (citations omitted). Prior to the Supreme Court's decision in *Saucier v. Katz,* we had held that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Katz v. United States,* 194 F.3d 962, 968 (9th Cir. 1999) (citations omitted).

In *Saucier,* the Supreme Court instructs that these inquiries are distinct. In order to decide whether state officers are entitled to qualified immunity, *Saucier* instructs that we must first determine whether, "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier,* 121 S.Ct. at 2156. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (citing *Wilson v. Layne,* 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)).

We concluded in our prior opinion that, viewing the evidence in the light most favorable to the protestors, a rational juror could conclude that the use of pepper spray against the protestors constituted excessive force and that Lewis and Philip were liable for the protestors' unconsti-

tutional injury. 240 F.3d at 1199-1209. This analysis is consistent with *Saucier*'s first inquiry: viewing the facts in the light most favorable to the protestors, Lewis and Philip violated the protestors' Fourth Amendment right to be free from excessive force.

Having answered *Saucier*'s first question in the affirmative, we turn to *Saucier*'s second inquiry, and conclude that it would be clear to a reasonable officer that using pepper spray against the protestors was excessive under the circumstances. The Fourth Amendment permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citations omitted). "[T]he essence of the *Graham* objective reasonableness analysis" is that " '[t]he force which was applied must be balanced against the *need* for that force: it is the need for force which is at the heart of the *Graham* factors.' " *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994)) (emphasis in original). The facts reflect that: (1) the pepper spray was unnecessary to subdue, remove, or arrest the protestors; (2) the officers could safely and quickly remove the protestors, while in "black bears," from protest sites; and (3) the officers could remove the "black bears" with electric grinders in a matter of minutes and without causing pain or injury to the protestors.

Defendants asserted at trial that the protestors' use of "black bears" constituted " 'active' resistance to arrest," meriting the use of force. The Eureka Police Department defines "active resistence" as occurring when the "subject is attempting to interfere with the officer's actions by inflicting pain or physical injury to the officer without

the use of a weapon or object." 240 F.3d at 1202-3. Characterizing the protestors' activities as "active resistance" is contrary to the facts of the case, viewing them, as we must, in the light most favorable to the protestors: the protestors were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers. In sum, it would be clear to a reasonable officer that it was excessive to use pepper spray against the nonviolent protestors under these circumstances.

Defendants' repeated use of pepper spray was also clearly unreasonable. As we recently concluded, the use of pepper spray "may be reasonable as a general policy to bring an arrestee under control, but in a situation in which an arrestee surrenders and is rendered helpless, *any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.*" *LaLonde v. County of Riverside,* 204 F.3d 947, 961 (9th Cir. 2000) (emphasis supplied). Because the officers had control over the protestors it would have been clear to any reasonable officer that it was unnecessary to use pepper spray to bring them under control, and even *less* necessary to *repeatedly* use pepper spray against the protestors when they refused to release from the "black bears." It also would have been clear to any reasonable officer that the manner in which the officers used the pepper spray was unreasonable. Lewis and Philip "authorized full spray blasts of [pepper spray], not just Q-tip applications," despite the fact that the manufacturer's label on the canisters of pepper spray defendants used " 'expressly discouraged' spraying [pepper spray] from distances of less than three feet." 240 F.3d at 1195, 1208.

Finally, it would have been clear to any reasonable officer that defendants' refusal to wash out the protest-

ors' eyes with water constituted excessive force under the circumstances. As we noted in *LaLonde* – when determining that the law had been clearly established by a date that is prior to the time the pepper spray was used on the protestors – "any reasonable officer would know that . . . a refusal without cause to alleviate [pepper spray's] harmful effects constitutes excessive force." *LaLonde*, 204 F.3d at 961. In two of the protests, officers threatened that they would not provide the protestors with water to wash out their eyes until they released themselves from the "black bears," and in one of the protests, the officers did not provide the protestors with water for over twenty minutes. Spraying the protestors with pepper spray and then allowing them to suffer without providing them water is clearly excessive under the circumstances.

We are not prevented from denying defendants qualified immunity merely because no prior case prohibits the use of the precise force at issue in this case. In the first instance, the circumstances of *LaLonde*, although not identical to those in this case, are "not distinguishable in a fair way from the facts presented in the case at hand" such that their results should be different. *Saucier*, 121 S.Ct. at 2157. In addition, regional and state-wide police practice and protocol clearly suggest that using pepper spray against nonviolent protestors is excessive. The law regarding a police officer's use of force against a passive individual was sufficiently clear at the time of the events at issue in this case that the defendants cannot claim qualified immunity on the ground that they made a reasonable mistake of law. *See Saucier*, 121 S.Ct. at 2158.

Moreover, in requiring that the law put a government officer "on notice that his conduct would be clearly

unlawful" before he could be held liable for violating the Constitution, the Supreme Court emphasized that it was not insisting that "courts must have agreed upon the precise formulation of the standard." *Id.* As we recently noted, a law can be violated "notwithstanding the absence of direct precedent . . . [o] therwise, officers would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct." *Deorle v. Rutherford*, 272 F.3d 1272, 1274-75 (9th Cir. 2001) (citation omitted).

Viewing the facts in the light most favorable to the protestors, we conclude that Philip and Lewis are not entitled to qualified immunity because the use of pepper spray on the protestors' eyes and faces was plainly in excess of the force necessary under the circumstances, and no reasonable officer could have concluded otherwise.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment for Lewis and Philip and remand this case for further proceedings consistent with this opinion and with our prior decision to reverse the district court's entry of judgment as a matter of law on behalf of Humboldt County, the City of Eureka, and their respective police departments.

APPENDIX B

[Filed FEB 25 2002]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-17250

HEADWATERS FOREST DEFENSE, et al.,
Plaintiffs-Appellants,

v.

COUNTY OF HUMBOLDT, et al.,
Defendants-Appellees.

ORDER

Before: PREGERSON, W. FLETCHER, and BRIGHT,[1]
Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Pregerson and W. Fletcher voted to reject the suggestion for rehearing en banc, and Judge Bright has so recommended said rejection.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has

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[1] Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEADWATERS FOREST DEFENSE,
Plaintiff,

and

MOLLY BURTON; VERNELL "SPRING" M. LUNDBERG; MICHAEL MCCURDY; ERIC SAMUEL NEUWIRTH; MAYA PORTUGAL; LISA MARIE SANDERSON-FOX; JENNIFER SCHNEIDER; TERRI SLANETZ; NOEL TENDICK,
Plaintiffs-Appellants,

v.

THE COUNTY OF HUMBOLDT, a political subdivision of the State of California; HUMBOLDT COUNTY SHERIFF'S DEPARTMENT; DENNIS LEWIS, Sheriff; GARY PHILP, Chief Deputy; MARVIN KIRKPATRICK, Deputy; JOHN SYLVIA, Deputy; CIARBELLINI, Sgt.; CITY OF EUREKA, a political division of the State of California; EUREKA POLICE DEPT; BILL HONSAL, Captain; JAMES MANOS, Sgt.,
Defendants-Appellees.

No. 98-17250

D.C. No. CV-97-03989-VRW

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
December 6, 1999—San Francisco, California

Filed May 4, 2000
Amended January 31, 2001

Before: Myron H. Bright,[1] Harry Pregerson, and
William A. Fletcher, Circuit Judges.

Opinion by Judge Harry Pregerson

COUNSEL

Mark Hughes, Denver, Colorado, for the plaintiffs-appellants.

Nancy K. Delaney, Eureka, California, for the defendants-appellees.

Margaret C. Crosby, for amicus curiae American Civil Liberties Union Foundation of Northern California.

ORDER

With the filing of the Amended Opinion, the panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Pregerson and W. Fletcher voted to deny the suggestion for rehearing en banc and Judge Bright so recommended said rejection.

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[1]The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

PREGERSON, Circuit Judge:

Nine environmental activists, along with an entity called Headwaters Forest Defense, brought this action under 42 U.S.C. § 1983, alleging that the use of pepper spray on the activists during three protests in Humboldt County constituted excessive and unreasonable force in violation of their Fourth Amendment rights. The named defendants included Humboldt County and its Sheriff's Department; Humboldt County Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, who authorized the use of pepper spray; the City of Eureka and its Police Department; as well as each law enforcement officer who participated in the protesters' arrests. The district court granted summary judgment on qualified immunity grounds in favor of all individual defendants, except for Sheriff Lewis and Chief Deputy Sheriff Philp.[2] A jury trial in this

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[2]To succeed in their § 1983 claims against Humboldt County, the City of Eureka, and their respective police departments, plaintiffs have to establish that: (1) the police used excessive and therefore unconstitutional force in arresting the protesters; and (2) a policy or practice of the municipalities' police departments "cause[d]" or was " 'the moving force' behind" the unconstitutional arrests. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994) (quoting *Monell v. Department of Social Servs. of City of New York*, 436 U.S. 658, 694 (1978)). The offending "policy" may be established by "a first-time decision to adopt a particular course of action [when that action] is directed by a governmentally authorized decisionmaker," such as the chief of police. *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481

case consumed nine days. At the close of plaintiffs' case-in-chief, the district court ruled that Lewis and Philp were also entitled to qualified immunity as a matter of law and dismissed the case against them. After deliberating for six hours on the remaining claims, the jury announced that it was irreconcilably deadlocked. The district court declared a mistrial and set a new trial date. But eight weeks later, the district court reversed itself and granted defendants' motion for judgment as a matter of law.

Plaintiffs contend on appeal that the district court erred in ruling that Sheriff Lewis and Chief Deputy Sheriff Philp were entitled to qualified immunity as a matter of law because historical facts were in dispute and that the court erred in directing a verdict in favor of the remaining defendants. We agree.

I.

FACTUAL BACKGROUND

In the fall of 1997, environmental activists staged three nonviolent protests against what they perceived to be the unnecessary logging of ancient redwood trees in the Headwaters Forest along California's northern coast. During each protest, two to seven protesters linked themselves together using self-releasing lock-down devices known as "black bears." A "black bear" is a ten to twenty-five pound steel cylinder (about one-fourth of an inch thick) with a rod or post welded into the center. The protesters placed their arms into the steel

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(1986)). To succeed in their individual claims against Sheriff Lewis and Chief Deputy Sheriff Philp, plaintiffs must establish that these defendants "set in motion" the acts committed by the arresting officers and that these defendants "knew or reasonably should have known" that such acts would cause constitutional injury, or that these defendants failed "in the training, supervision, or control" of these officers in the proper use of pepper spray to effect an arrest. *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez*, 946 F.2d at 646).

cylinders and attached steel bracelets worn around their wrists to the center rods or posts in the "black bears" by using mountain climbers' carabiners. Each "black bear" linked two protesters together. When in place, the devices completely immobilized their arms and prevented their separation. By simply using their hands to unclip the carabiners on the inside of the cylinder, the protesters could disengage themselves from the devices. If the protesters did not voluntarily agree to release themselves, the lock-down devices made it difficult, but not impossible, for law enforcement officers to take the protesters into custody upon arrest. To forcibly remove "black bears," the officers had to use a Makita grinder. A Makita grinder is a hand-held electric grinder that can cut through steel.

The protesters' use of these lock-down devices is at the heart of this case. Since 1990, nonviolent environmental activists had on many previous occasions used these and other mechanical devices to link themselves physically together during similar protests in Humboldt County. Over the years, the devices became increasingly sturdy and more difficult for the police to remove forcibly. The initial devices were bicycle locks or lightweight metal cylinders, weighing less than five pounds. By 1995, they had evolved into the "black bears" that were used here.

In 1997, the Humboldt County Sheriff's Department organized a special response team comprised of Special Services Deputies to deal with the environmental protests. The officers selected for the team were those with special training and experience in the use of a Makita grinder to remove lock-down devices safely. By the fall of 1997, one of the officers had used a Makita grinder to remove hundreds of lock-down devices from the arms of environmental protesters. He had done so safely, without causing injuries to either himself or the protesters.

Nevertheless, because a Makita grinder generates sparks when used, the defendants claim to have had a growing con-

cern about the danger involved in using it. So, in the summer of 1997, the Humboldt County Sheriff's Department explored alternatives for effecting the arrest of environmental protesters in lock-down devices — including the use of oleoresin capsicum aerosol ("OC" or "pepper spray"). Defendants Lewis and Philp consulted a certified trainer in the use of pepper spray, the county's risk manager, and its district attorney. And they read much of the available literature on the subject. By summer's end, defendants concluded that the use of a lock-down device by *any* protester — even an otherwise nonviolent protester who posed no danger to the public, himself, or the arresting officers — constituted "active resistance" to arrest, warranting police use of pepper spray as a "pain compliance technique."

But, according to then-California Attorney General Dan Lungren, the use of pepper spray under these circumstances was unprecedented; its use had been previously "limited to controlling hostile or violent subjects." Even Sheriff Lewis conceded at trial that no law enforcement officer in Humboldt County, the State of California, or anywhere in the nation had ever used pepper spray on nonviolent protesters as it was used in this case. The defendants nonetheless contend, and the district court found as a matter of law, that the officers' use of pepper spray during the three protests at issue here was reasonable and appropriate under the circumstances.

A. The Scotia Protest

The first protest took place on September 27, 1997, at the headquarters of the Pacific Lumber Company in Scotia, California ("the Scotia protest"). During the Scotia protest, plaintiffs Vernell "Spring" Lundberg (a minor at the time), Jennifer Schneider, Molly Burton, and Eric "Sam" Neuwirth, along with three others, ran into the Pacific Lumber Company lobby, sat down in a circle, and locked themselves together using the "black bears." Meanwhile, other activists held a peaceful rally (including folk music and protest songs) and a

mock trial of the owner of Pacific Lumber Company on the sidewalk in front of the Pacific Lumber Company building. Still other activists hung protest signs from the roof of the Pacific Lumber building.

Pacific Coast Lumber employees called the Humboldt County Sheriff's Department, which dispatched its special response team. Upon arrival, the officers observed that the seven protesters had placed the "black bears" under their arms and legs, making it particularly difficult to use a grinder to remove them. The officer in charge decided that using pepper spray was the most appropriate and safest way to arrest the trespassing protesters. He and the other officers testified that they made this decision solely because of the difficulty in using a grinder in these circumstances. It was "immaterial" to them that the protesters were peacefully engaged in an act of civil disobedience, as opposed to being violent. And the protesters outside the building were not a factor in their decision to use the pepper spray on those inside the building. Indeed, it is undisputed that the protesters both on the roof and outside the building were nonviolent, did not interfere with ingress or egress to and from the Pacific Lumber building, posed no safety risks to the public or to the officers, and willingly dispersed when their rally and mock trial were ended or when the police directed them to do so.

The Sheriff's videotape of the incident reveals that the officers never attempted to negotiate with the protesters. Once they made the decision to use the pepper spray, the officers simply warned the protesters repeatedly that if they refused to release themselves from the "black bears" the officers would apply pepper spray to their faces. The protesters tucked their heads into their chests and refused to release. The officers then forced four protesters' heads back and applied pepper spray with a Q-tip to the corners of their closed eyes. The protesters screamed in pain. The three other protesters, including one who announced that she had asthma, then voluntarily released. The officers put plastic handcuffs on these three pro-

testers and placed them on the couch right next to those still protesting. They remained there for more than an hour, cheering on the others who continued protesting and excoriating the officers for using pepper spray on them. At this point, the officers did not offer to flush out the protesters' eyes with water.

The four protesters who remained in the lock-down devices were seated in sets of two. The circle of human legs and arms had been broken. Nevertheless, the officers reapplied the pepper spray with Q-tips to the protesters' eyelids. The protesters still did not release. Twenty minutes after the pepper spray was first applied and six minutes after its second application, the officers sprayed water into the eyes of the protesters to dilute the OC, continuing to do so periodically for more than an hour. Thereafter, the officers escorted the three protesters who were never pepper sprayed out of the building and carried the two pairs of remaining protesters out of the building on stretchers. It took two officers just three minutes to carry each of the two pairs of protesters out of the building; a few other officers present opened doors and directed their movement. The officers appeared to have no trouble lifting and carrying the protesters out. Once outside the building, one pair of protesters voluntarily released themselves. A Makita grinder was used to extricate the other pair from the "black bears." It took ten minutes to remove the device by grinder. The officers threw a fire blanket over the protesters to protect them from the sparks generated by the grinder's use.

B. The Bear Creek Protest

The second protest took place on October 3, 1997, when two pairs of protesters, including plaintiffs Michael McCurdy and Noel Tendick, using "black bears" locked themselves to two Pacific Lumber Company bulldozers at a remote logging site on Pacific Lumber Company property (the "Bear Creek protest"). Again the special response team was called to the scene. The same officer in charge at the Scotia protest was in

charge at Bear Creek. He testified that he told the protesters that the officers were going to use pepper spray on them if they didn't release because "we're getting out of here quicker that way." He also testified to his concern that using a grinder would have presented a fire hazard because of the diesel fuel and oil canisters around the bulldozers. He added that protesters hiding in the woods presented an unspecified danger, although the Sheriff's videotape does not show the threatening presence of any other demonstrators. The officers made no attempt to negotiate with the protesters. They simply threatened repeatedly to use pepper spray unless the protesters released themselves from the "black bears." But before proceeding, the officers waited more than half an hour for the videographer to arrive.

The Sheriff's videotape reveals that two protesters released themselves from the "black bears" when threatened with the immediate use of pepper spray. Despite repeated warnings, two others refused. The last warning told the protesters that they had "five minutes" to release themselves from the "black bears." But the actual elapsed time between that last warning and the first application of pepper spray was less than two minutes. The officers applied the pepper spray with a Q-tip to the closed eyes of both protesters. Despite the protesters' pleas for water to flush the pepper spray out of their eyes, one of the officers can be heard on the videotape saying that they will only be given water if they release and that the pain will only get worse in thirty seconds when he sprays the OC in their faces. A minute later, he sprayed the OC directly into both of the protesters' faces in short full bursts from inches away. The videotape reveals that the blast of pepper spray ran down one protester's face and into his mouth.

Five minutes later, the protesters again refused to release and the officer in charge said that they "have all day to do this . . . [and] all kinds of cans of chemical weapons." Protester Tendick then said, "If you've got all day to do this, why don't you cut us out?" To which the officer in charge responded,

"because we are already committed here." The officers then offered to spray water from hand-held spray bottles onto the protesters' faces to try to flush the pepper spray out. Tendick testified that lightly spraying his face with water only made the pain worse because the water caused the OC to drip into his nose and mouth. On the videotape, Tendick can be heard screaming in pain after the water was administered. Thereafter, a Makita grinder was safely used to cut both protesters out. Despite the officers' stated concern for the danger posed by using the grinder around fuel and oil canisters, the officers did not remove the canisters when they decided to use the grinder. No injuries resulted from the use of the grinder.

C. The Riggs Protest

The third protest took place less than two weeks later, on October 16, 1997, in the Eureka office of Congressman Frank Riggs. Plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal (a minor at the time), and Jennifer Schneider entered the Congressman's office, dropped wood chips on the floor, and chained themselves together using "black bears" around a tree stump that another protester had brought into the Congressman's office. Meanwhile, a crowd of fifty nonviolent protesters gathered on the street outside the Congressman's office.

Officers from the Eureka Police Department and from the Humboldt County special response team arrived at the scene in response to calls for assistance made by the Congressman's staff. The Humboldt County special response team determined that the wood chips would create a fire hazard if a grinder was used. Although Congressman Riggs's staff made a vacuum cleaner available to them to remove the wood chips, the officers chose not to use it. Instead, on the basis of the Humboldt officers' recommendation, the Eureka Police Captain in charge authorized the use of pepper spray on the protesters. Again no attempt at negotiation was made.

The Sheriff's videotape shows that the officers repeatedly warned the protesters that pepper spray would be used if they did not voluntarily release. One of the protesters declared that they had to take a stand against the use of pepper spray against nonviolent civil protesters. Another pleaded with the officers not to use the pepper spray. She pointed out that the protesters were all young women — one a minor — and asked the officers if they would want someone to use pepper spray on their own daughters. She also pointed out that the protesters posed no danger to anyone. Nevertheless, the officers pulled each of the protester's heads back and applied pepper spray to their eyes with a Q-tip. One protester, Maya Portugal, claims that one of the officers pried open her eyes and applied the pepper spray directly on them. Although the videotape lends some support to this claim, it is ultimately unclear whether this occurred. One of the protesters can be heard on the videotape yelling, "no, don't open them [my eyes]." The defendants deny that any of the protesters' eyes were opened when the pepper spray was used.

At this point, no water was offered to wash the pepper spray off the protesters' eyes. Seven minutes after the initial application, one of the officers can be heard on the videotape saying that water will be given if the protesters release themselves from the "black bears." At that point, one of the protesters released, followed shortly thereafter by another, leaving the two remaining protesters attached only to each other. Then, one of the remaining protesters asked why the officers could not physically carry them out of the Congressman's office and use a grinder to cut them out once they were outside the building. An officer responded by saying that the jail "would not accept you like this" and that it "is too dangerous to transport you like this."

One officer then stood within a foot of one of the remaining protesters and sprayed the pepper spray directly into her face. Within three minutes, the remaining two protesters released.

The officers then offered water from spray bottles to wash the pepper spray off the protesters' faces.

II.

Procedural History

On October 30, 1997, the nine protesters on whom the police had used pepper spray and an entity called the Headwaters Forest Defense filed this action under 42 U.S.C. § 1983, claiming that the application of pepper spray to the eyelids and faces of nonviolent protesters constituted use of excessive and unreasonable force to effect their arrests in violation of their Fourth Amendment rights. Each plaintiff sought damages for the pain and emotional trauma that each suffered and for the violation of their constitutional rights. Because no one sought medical treatment for physical injuries, special damages were not claimed. But plaintiffs sought punitive damages from the individual defendants.

On defendants' motion for summary judgment, the district court granted all individual defendants qualified immunity except for Humboldt County Sheriff Dennis Lewis and Chief Deputy Sheriff Gary Philp, the officers who initially authorized the use of pepper spray on the nonviolent protesters. The court, however, refused to grant summary judgment in favor of the defendants on the excessive force charges. On those charges, the court stated in its written decision that whether the use of pepper spray "is reasonable is for the jury to determine. Jury consideration is particularly appropriate here in that OC, a chemical agent, has not been used in past demonstrations." The court's decision noted that the parties vigorously disputed what occurred before, during, and after the use of pepper spray on the protesters during each protest. All of the disputed facts directly addressed the question whether the use of pepper spray was needed to effect the arrest of nonviolent protesters in lock-down devices. For example, the court's decision noted that the manufacturer's instructions on the can-

isters of pepper spray that the officers used "expressly discouraged" spraying OC from distances of less than three feet. Similarly, the decision noted that the Humboldt County Sheriff's deputy in charge of chemical agent training — the only certified trainer in the use of OC with whom Lewis and Philp had consulted before authorizing its use — recommended applying pepper spray with a Q-tip only. Yet here, the officers applied full blast sprays of OC into some of the protesters' faces from just inches away.

In addition, the court noted that Humboldt County had only one official general order that addressed police use of chemical agents such as pepper spray. And it stated in pertinent part that:

> The department issues non-lethal aerosol chemical agents to each sworn member of the Department. This aerosol is furnished as a *defensive weapon* for the protection of department members and as a possible alternative to the additional use of force. . . . The chemical agent is intended for use in those cases wherein a member of the Department is attempting *to subdue an attacker or a violently resisting suspect, or under other circumstances which under the law permit the lawful and necessary use of force*, which is best accomplished by the use of a chemical agent.

(Emphasis added). Similarly, the Eureka Police Department use-of-force policy statement "classified the use of OC-based products as a compliance technique directly *below* intermediate force on the use-of-force continuum." (Emphasis added). According to that policy statement, even intermediate force may not be used on nonviolent suspects who are passively resisting arrest. The policy stated in pertinent part that:

> [OC] shall be used instead of baton strikes whenever practical and when the failure to use it would result

> in the need to apply more force which holds the greater potential for injury. OC shall not be used to harass or punish a prisoner. Chemical agents are nonlethal devices designed *to temporarily subdue or overcome [an arrestee] by spraying the agent into the face. . . .*"

(Emphasis added).

The case proceeded to trial. After nine days, plaintiffs completed their case-in-chief. Thereupon, on defendants' motion, the district court ruled that Lewis and Philp were entitled to qualified immunity as a matter of law and dismissed the case against them. After deliberating for only six hours, the jury announced it was deadlocked.

The district court declined to give a formal *Allen* charge[3] to the jury as both parties requested, but the court did query the jury foreperson "to get some sense from the jury of the degree to which they [felt] that they [were] deadlocked." Without polling each juror, the court satisfied itself that the jurors had fully reviewed the evidence, considered each other's views, and were irreconcilably deadlocked. In a colloquy with counsel on the record but out of the jury's presence, the court stated that the issue in this case is "a simple and straightforward one . . . . *It's obviously one on which reasonable people can differ.*" (Emphasis added). Thereafter, the district court

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[3]An *Allen* charge — named after the case of *Allen v. United States*, 164 U.S. 492 (1896) in which it was first approved — is a supplemental jury instruction that a trial judge may give when a jury announces that it is unable to agree on a verdict. *See United States v. Hernandez*, 105 F.3d 1330, 1333-34 (9th Cir. 1997). Without being coercive, an *Allen* charge urges jurors to keep trying to reach a verdict. *See id.* It is designed to assist them in finding common ground by reminding them of their duties as jurors, encouraging them to give due deference to the arguments of fellow jurors and to reexamine their own views without abandoning their deeply felt beliefs. *See id.*; *see also* Ninth Circuit Manual of Model Criminal Jury Instructions, No.7.6 (1997).

declared a mistrial, set a new trial date, and took under submission defendants' renewed motion for judgment as a matter of law.

Eight weeks later, the district court granted defendants' renewed motion, vacated the new trial date, and entered judgment for the defendants, finding that "there is no *reasonable basis* for jurors to find that the officers' use of [pepper spray] was objectively unreasonable in light of the facts and circumstances confronting them." (Emphasis added). Plaintiffs timely appeal. We have jurisdiction to review the final order of the district court under 28 U.S.C. § 1291.

III.

A. Judgment as a Matter of Law

We review de novo the district court's grant of judgment as a matter of law, *see Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1145 (9th Cir. 1996), using "the same standard as the district court . . . under Fed. R. Civ. P. 50(a)." *Forrett v. Richardson*, 112 F.3d 416, 419 (9th Cir. 1997), *overruled on other grounds*, *ChromaLighting v. GTE Products Corp.*, 127 F.3d 1136 (9th Cir. 1997). Rule 50(a)(1) provides in pertinent part that:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim . . . .

Fed. R. Civ. P. 50(a)(1).[4]

[4]Technically, the district court here granted defendants' renewed motion for judgment as a matter of law pursuant to Rule 50(b). The fact that the motion was granted after a mistrial was declared because of jury deadlock does not alter the standard to be applied on appeal.

"Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party, allows only one reasonable conclusion . . . ." *Acosta*, 83 F.3d at 1145. "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). Indeed, " '[i]f conflicting inferences may be drawn from the facts, the case must go to the jury.' " *Pierce v. Multnomah County, Oregon*, 76 F.3d 1032, 1037 (9th Cir. 1996) (quoting *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986)).

Here, in its written decision granting defendants judgment as a matter of law, the district court acknowledged its obligation to view the evidence in the light most favorable to the plaintiffs as the nonmoving parties and to resolve all inferences and conflicts in the evidence in their favor. But, as the discussion below reveals, the district court failed to do so. Its decision is replete with assertions that the weight of the evidence favors the defendants and with conclusions that the court reached by resolving conflicts in the evidence *against* the nonmoving parties. In this regard, the district court erred. As the Supreme Court has held in ruling on a motion for judgment as a matter of law,

> the [district court] judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.

Anderson, 477 U.S. at 252.

A jury's inability to reach a verdict does not necessarily preclude a judgment as a matter of law. *See, e.g., Demaine v. Bank One*, 904 F.2d 219, 220 (4th Cir. 1990). But none of the cases cited by the defendants in support of the directed verdict in this case involved charges of excessive force. Each were

contract dispute cases in which the central issue was either the existence of a valid contract, *see, e.g., id.*; *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 462 (2d Cir. 1972), or whether a contract fell within an exception to the antitrust laws, *see City and County of Honolulu v. Hawaii Newspaper Agency, Inc.*, 559 F. Supp. 1021, 1026 (D. Haw. 1983). Although we have reviewed excessive force cases in which directed verdicts in favor of defendants have been ordered *after* juries rendered verdicts in favor of the plaintiffs, *see, e.g., Forrett*, 112 F.3d at 419-21 (affirming district court's order); *Acosta*, 83 F.3d at 1145-47 (reversing district court's order), we know of no excessive force case that presents the unique procedural posture of this case, i.e., a directed verdict for the defendants after the jury deadlocked and a mistrial was declared.

Indeed, *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), on which defendants primarily rely is procedurally wholly distinguishable from this case. In *Forrester*, the jury *reached* a verdict on the excessive force charge, the district court denied a motion for judgment notwithstanding the verdict, and the issue on appeal was whether substantial evidence supported the jury's verdict.[5] *See id.* at 806. Here, our review of the directed verdict is de novo. *See Amarel v. Connell*, 102 F.3d 1494, 1517 (9th Cir. 1996). The *Forrester* court was obligated the give substantial deference to the jury's determi-

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[5]Curiously, defendants here cite *Forrester* to support the contention that the existence of videotape footage of each of the incidents in question favors a determination of reasonableness as a matter of law. But this court's reference to the fact that videotape evidence existed in *Forrester* was made in the context of declaring that "the jury had more than a sufficient amount of evidence presented to them from which they could formulate their verdicts . . . ." *Id.* at 807. Thus, this aspect of *Forrester* is inapposite to defendants' contention here. Moreover, the videotape evidence in *Forrester* aided the jury in reaching a verdict because it apparently "removed much argument and interpretation of the facts themselves." *Id.* The videotape evidence here appears to raise more questions than it answers, which in the context of a motion for judgment as a matter of law must be resolved in favor of the plaintiffs as the nonmoving parties.

nation and uphold its verdict so long as the verdict was supported by substantial evidence. *See Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (stating that the Ninth Circuit reviews jury verdicts to determine if they are supported by "substantial evidence"). Because the *Forrester* court was required to defer to the jury, it ignored evidence that could compel the opposite result on de novo review.

The court in *Forrester* had to decide whether the jury's verdict that police use of Orcutt Police Nonchakus ("OPNs")[6] was not excessive force was reasonable. Here, we consider whether a reasonable jury could conclude that police use of pepper spray constitutes excessive force.

B. Excessive Force

The Fourth Amendment prohibition against unreasonable seizures permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *see also Chew*, 27 F.3d at 1440-41. As we have repeatedly said, whether the force used to effect an arrest is reasonable "is ordinarily a question of fact for the jury." *Liston v. County of Riverside*, 120 F.3d 965, 976 n.10 (9th Cir. 1997) (citing, *e.g.*, *Forrester v. City of San Diego*, 25 F.3d 804, 806 (9th Cir. 1994)); *see also Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). Although excessive force cases can be decided as a matter of law, they rarely are because the Fourth Amendment test for reasonableness is inherently fact-specific. *See Chew*, 27 F.3d at 1443 (citing *Reed v. Hoy*, 909 F.2d 324, 330 (9th Cir. 1989)). It is a test that escapes "mechanical application" and "requires careful attention to the facts and circumstances of each particular

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[6]As discussed *infra*, OPNs are "two sticks of wood connected at one end by a cord," *Forrester*, 25 F.3d at 805, which are used to grip a resisting arrestee's wrist in a progressively tighter and more painful manner until the arrestee ceases resisting. *See id.* at 808 n.5.

case," *Graham*, 490 U.S. at 396, and thus naturally favors jury resolution.

According to *Graham*, "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a *careful balancing of 'the nature and quality of the intrusion* on the individual's Fourth Amendment interests' *against the countervailing governmental interests at stake.*" 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)) (emphasis added). Assessing "the nature and quality" of a given "intrusion" requires the fact finder to evaluate "the type and amount of force inflicted." *Chew*, 27 F.3d at 1440. Weighing the governmental interests involved requires the fact finder to evaluate such factors as "(1) the severity of the crime at issue, (2) whether the suspect pose[d] an immediate threat to the safety of the officers or others, . . . (3) whether he [was] actively resisting arrest or attempting to evade arrest by flight," and any other "exigent circumstances [that] existed at the time of the arrest." *Chew*, 27 F.3d at 1440-41 & n.5. As we have previously explained, "the essence of the *Graham* objective reasonableness analysis" is that " '[t]he *force* which was applied must be balanced against the *need* for that force: it is *the need for force* which is at the *heart* of the *Graham* factors.' " *Liston*, 120 F.3d at 976 (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994)) (emphasis added). Thus, where there is no need for force, *any* force used is constitutionally unreasonable. *See P.B. v. Koch*, 96 F.3d 1298, 1303-04 & n.4 (9th Cir. 1996).

We begin our analysis of the reasonableness of the force used in this case by examining the district court's assessment of the "nature" of the use of pepper spray and the "quality of the intrusion" caused on the protesters' bodily integrity under the Fourth Amendment. We will then examine the district court's assessment of the countervailing governmental interests at stake, focusing first on the interests on which the district court relied in granting defendants' motion for judgment

as a matter of law. We will then examine the governmental interests addressed in Fourth Amendment jurisprudence that the district court failed to consider. Such interests include the safety threat, if any, posed by the protesters to the public, to the officers, or to themselves; the exigencies, if any, bearing on the decision to use pepper spray during each protest; the severity of the protesters' crimes; and the alternatives available to the police to effect the arrests of the protesters.

1. The Nature and Quality of the Intrusion

Here, the district court concluded that "the severity of the intrusion upon the arrestees' personal integrity was minimal" because it did not involve the threat of "deadly force or even . . . a significant level of physical force. Rather the force used was merely the infliction of transient pain without significant risk of physical injury." We disagree with this characterization of the intrusion.

Although the absence of deadly force or physical blows can mean that a intrusion on an arrestee is "less significant than most claims of force," *Forrester*, 25 F.3d at 807, that fact alone is not dispositive in excessive force cases. Under Fourth Amendment jurisprudence, the law is well settled that a plaintiff may recover " 'nominal damages without proof of actual injury' " for unreasonable intrusions on one's bodily integrity. *Larez*, 946 F.2d at 640 (quoting *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding nominal damages are available under 42 U.S.C. § 1983)). Indeed, in *Wilks v. Reyes*, 5 F.3d 412 (9th Cir. 1993), we expressly rejected the Fifth Circuit's requirement that a plaintiff show "significant injury" to establish an excessive force claim under the Fourth Amendment. *Id.* at 416 ("The law of this circuit entitles a plaintiff to an award of nominal damages if the defendant violated the plaintiff's constitutional right . . . *even if the plaintiff suffered no actual damage*." (emphasis added)). Thus here, the district court erred in focusing on the purported absence of evidence of a "significant risk of physical injury" from the use of pep-

per spray. Under *Graham* and *Forrester*, whether the use of force poses a risk of permanent or significant injury is a *factor* to be considered in evaluating the need for the force used in a particular case — but it is certainly not dispositive.

Moreover, the evidence in the record does not establish that the use of pepper spray here constituted a "minimal" intrusion on the protesters' bodily integrity as a matter of law. The evidence suggests that the protesters suffered excruciating pain when the OC was applied to their eyelids with a Q-tip — and even more so when sprayed into their faces in full blasts from inches away. In fact, the Humboldt County Sheriff's deputy in charge of chemical agent training testified that pepper spray is *designed* to cause intense pain, a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx. He also testified that its known psychological effects are "disorientation, anxiety, and panic." On this record, a rational juror could readily conclude that the intrusion suffered was more than "minimal."[7]

Indeed, our opinion in *Forrester* suggests that the uncontrollable nature of the pain caused by pepper spray distinguishes it from the "pain compliance technique" challenged in that case. *Forrester* held that sufficient evidence supported the jury's finding that the use of OPNs was reasonable under

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[7]We previously held that the use of pepper spray by a defendant during the commission of a felony may constitute use of a *dangerous weapon*, defined as "capable of inflicting death or serious bodily injury" for sentencing purposes. *United States v. Neill*, 166 F.3d 943, 949 (9th Cir. 1999) (citing U.S.S.G. § 1B1.1, cmt. n.1(d),(j)). Admittedly, police use of pepper spray as a tactical tool to effect arrest is distinguishable from its use by a felon during the commission of a robbery. Nevertheless, the evidence in this case reveals that the police sprayed OC directly into some of the protesters' faces from only inches away in much the same manner as the defendant in *Neill*. And yet, Humboldt County's deputy in charge of chemical agent training testified that spraying OC into a person's face from less than 3 feet is not safe.

the circumstances. OPNs are "two sticks of wood connected at one end by a cord," 25 F.3d at 805, which are used to grip a resisting arrestee's wrist in a progressively tighter and more painful manner until the arrestee ceases resisting. *See id.* at 808 n.5. In *Forrester*, the police used OPNs on hundreds of "Operation Rescue" demonstrators who were attempting to shut down the operations of an abortion clinic by blocking access to the facility. *See id.* at 805, 807.[8] In explaining the nature of the force used in *Forrester*, we stated:

> Unlike the use of a lighted cigarette, which would create immediate and searing pain, the discomfort produced by the OPNs was gradual in nature. The videotape (which was seen by the jurors) illustrates that the police first applied a loose grip and then progressively tightened their hold until the demonstrators stood and ceased resistance. The moment the demonstrators complied, the police released the OPNs.

Id. at 808 n.5. Although the use of OPNs in *Forrester* caused

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[8]According to the defendants, the demonstrators in *Forrester* were "truly passive" because they went limp when police attempted to take them into custody, whereas the protesters here were not "passive," but "actively resisting" arrest because they used the lock-down devices. The fact that the demonstrators in *Forrester* posed an actual safety threat to the public by physically blocking access to medical facilities is a factor that the defendants overlooked in assessing the demonstrators "passive" or "active" stance. In fact, the defendants contend that because we upheld the jury's verdict in *Forrester* that declared the use of OPNs on "passive" demonstrators to be reasonable under the circumstances, we should therefore hold that the use of pepper spray on the "actively resisting" protesters in this case is also reasonable. This contention reflects a basic misunderstanding of the full factual breadth of the *Graham* balancing test. More importantly, this contention misses the point of the issue on appeal. We are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record.

"varying degrees of injury . . . including bruises, a pinched nerve, and one broken wrist," we upheld the jury's verdict in part because: "Each officer had the discretion to use force or not, and if deciding to do so, how much force to apply." *Id.* at 808.

Here, the videotape evidence reveals that the application of the pepper spray with a Q-tip and then by short full blasts created "immediate and searing pain" that could not be moderated by the officers at their discretion or terminated by them the moment the protesters complied with their demands. According to the defendants, the only way to relieve the pain caused by pepper spray is to flush it out thoroughly with water. Police training tapes recommend using a "free-flowing hose to wash the victim's face" or "the use of a big bucket of water in which the victim can actually stick [his or her] face down into to get relief." But here, the officers offered only to spray water in short bursts onto the protesters' faces from hand-held plastic bottles, which the evidence suggests may have actually exacerbated the pain by causing the OC to run into the protesters' noses and mouths rather than flushing it out. Moreover, whether water was offered at all for this purpose during each protest is disputed. Yet the district court's ruling fails to mention this evidence, let alone view it in a light most favorable to the plaintiffs as the nonmoving parties.[9]

Forrester did not hold "that pain compliance techniques are constitutionally permissible as a matter of law." 25 F.3d at 809 (Kleinfeld, J., dissenting). Nor did it establish a rule of qualified immunity for the use of pain compliance techniques

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[9]An example of the district court's failure to view the evidence in the light most favorable to the plaintiffs as the nonmoving parties and to resolve all conflicts in the evidence in their favor is the court's statement that "the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes." The court came to this conclusion despite plaintiff Portugal's contrary testimony, the cry of one of the young female protesters heard on the videotape asking the officers not to open her eyes, and the unclear images revealed on the videotape.

to arrest passively resisting misdemeanants. *Forrester* simply held that whether the use of OPNs as a pain compliance technique constituted excessive force was a question of fact that was properly submitted to the jury for its decision. Similarly, we hold here that whether the use of pepper spray in this case constituted excessive force is a question of fact that should have been submitted to a jury for its decision.

2. The Governmental Interests at Stake

The district court found that the primary governmental interests at stake during the three protests were in "quickly removing the trespassing plaintiffs" and in "preventing the organized lawlessness" of a "large group of protesters." The court stated:

> In each incident, plaintiffs were part of a large group of protesters operating in an organized and concerted effort to invade private property, obstruct business and hinder law enforcement. Although these crimes are misdemeanors, "[t]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of citizens." *Bray v. Alexandria Woman's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring).

We disagree with the district court's characterization of the evidence. In assessing the governmental interests, the court failed to view the evidence in the record and all inferences that could be drawn therefrom in a light most favorable to the plaintiffs. Moreover, the court incorrectly applied the *Graham* test and Justice Kennedy's concurrence in *Bray*. When the evidence is viewed in the light most favorable to the plaintiffs, it is clear that the governmental interests at stake here do not compel the conclusion that the use of pepper

spray — either with a Q-tip or by short full blasts — was reasonably necessary as a matter of law in the totality of the circumstances.

i. Speedy Arrests

The evidence in the record strongly suggests that the officers' decisions to use pepper spray during each protest had nothing to do with the government's purported interest in "quickly removing the trespassing plaintiffs." During the Scotia protest, the deputies allowed the three protesters who had complied with the police as soon as the pepper spray warnings were given to remain on site — and to continue to cheer on their still-resisting cohorts. If the officers used the pepper spray to hasten the removal of the protesters from private property, failing to remove the protesters who had released from the "black bears" belied this intent. Moreover, the repeated applications of pepper spray actually prolonged the incident for over an hour. Once the decision was made to remove the protesters physically, all were out of the building and in custody within six minutes. Ten minutes later, all were safely ground-out of the lock-down devices.

During the Bear Creek incident, the officers delayed using the pepper spray for half an hour until the sheriff's videographer arrived. In addition, one of the officers was heard to say on the videotape that they "have all day to do this." At Congressman Riggs' office, after the initial applications of pepper spray, two of the protesters voluntarily released themselves from the lock-down devices, but they were not immediately removed from the premises. Nor did the officers physically remove the remaining two female protesters still in the lock-down devices, despite their youth and diminutive size. Instead, the officers chose to reapply the pepper spray in short full bursts into their faces. The evidence suggests that full blast sprays of pepper spray actually delayed the protesters' arrests and prolonged the incident.

Thus, the evidence simply does not support the district court's conclusion that the use of pepper spray was needed to remove the protesters from the premises quickly.

ii. Organized Lawlessness

The district court concluded that one of the reasons the officers needed to use the pepper spray to effect the arrests of the protesters was because "the officers had a substantial interest in preventing the organized lawlessness" of a "large group of protesters." Each incident involved two to seven protesters in lock-down devices — including six young women, two of whom were sixteen and seventeen years old. During both the Scotia and Riggs protests, the protesters in the lock-down devices were demonstrating inside the Pacific Lumber Company building and Congressman Riggs's office. They were physically and visually separated from the large peaceful demonstrations that were taking place outside the two buildings. The evidence regarding the Bear Creek protest is at best conflicting as to how many protesters — other than the four in lock-down devices — were present. The officers claim that many protesters were hiding in the woods. But there is no evidence that a large, lawless group was anywhere in sight.

Most importantly, the uncontroverted evidence is that the decision to use pepper spray on the protesters during each incident was not made because of the presence of "a large group of protesters." The officer in charge during each incident testified that the decision to use pepper spray was made solely because of the difficulty in using a Makita grinder to remove the "black bears." With respect to the Scotia and Riggs protests, all the officers who testified stated that the presence of the protesters outside the buildings was not a factor in the decision to use the pepper spray on the protesters inside the buildings.

In fact, the defendants consistently testified that the pepper spray was needed during each of the protests simply

because a handful of protesters had used lock-down devices, which defendants argued constituted "active" resistance to arrest. But this characterization of the protesters' conduct is belied by the Eureka Police Department's own definition of "active resistance," with which Sheriff Lewis agreed. According to that written definition, "active resistance" occurs when the "subject is attempting to interfere with the officer's actions by inflicting pain or physical injury to the officer without the use of a weapon or object." No evidence in the record suggests that the protesters here attempted to inflict pain or serious injury on the arresting officers.

Indeed, there is no evidence supporting the notion that the police needed to use pepper spray in this case to "maintain order and preserve the rights of its citizens" against a "large group" of "lawless" and "menacing" protesters. *Forrester*, 25 F.3d at 807 (quoting *Bray*, 506 U.S. at 287 (Kennedy, J., concurring)). The force used to effect arrests can be deemed reasonable only on the basis of the facts and circumstances confronting the police when the arrests took place. Such force cannot be justified on the basis of abstract notions of law and order. *Bray* was not an excessive force case. Justice Kennedy's cautionary words were uttered in the context of describing when deficiencies in the resources of state and local law enforcement may necessitate the involvement of federal authorities "to protect the lives and property of citizens or to enforce the criminal law." *Bray*, 506 U.S. at 287-88 (quoting 42 U.S.C. § 10502(3)). His words should not be invoked to justify the use of force to effect arrests in factual circumstances that do not justify the use of force.

iii. Safety of Others

Under our Fourth Amendment jurisprudence, "the most important single element" in the *Graham* analysis is "whether the suspect pose[d] an immediate threat to the safety of the officers or others." *Chew*, 27 F.3d at 1441. Here, the protesters were nonviolent and unarmed. Most were young

women, two of whom were minors; none were physically menacing. They posed no safety threat to themselves, the officers, or the public at large.

Unlike the protesters in *Forrester*, the protesters here did not block access to and from a medical clinic, " 'preventing patients, as well as physicians and medical staff, from entering the clinic to render or receive medical or counseling services.' " 25 F.3d at 805 n.1 (quoting *Bray*, 506 U.S. at 309). Nor did they behave threateningly toward the police. To the contrary, the protesters repeatedly pleaded with the officers not to use the pepper spray because they posed no danger to anyone. Finally, the protesters posed no danger to themselves. *Cf. Monday v. Oullette*, 118 F.3d 1099 (6th Cir. 1997) (holding that the use of pepper spray to thwart a suicide attempt of a mentally ill man who refused treatment was reasonable). Because the protesters' conduct posed no danger to themselves or others, a reasonable fact finder could conclude that using pepper spray to effect their arrests bore "no reasonable relation to the need" for force. *Koch*, 96 F.3d at 1304.

iv. Split-Second Judgment

Throughout the trial and in their papers on appeal, defendants continually alluded to the ongoing battle the Humboldt County Sheriff's Department and the Eureka Police Department were having with environmental activists prior to the protests in question. But the proper focus of the analysis under *Graham* is on events *immediately* confronting the officers when they decided to use pepper spray. The fact that the defendants were increasingly frustrated by the protesters — who had developed techniques such as lock-down devices to prolong nonviolent civil protests — is irrelevant under *Graham*.

Under *Graham* and its progeny, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer *on the scene* . . . ." *Graham*,

490 U.S. at 396 (emphasis added). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 396-97. "[W]hen we evaluate whether the police conduct was lawful or unlawful, we must do so in light of the dangerousness of the particular situation that confronted the police," *Washington v. Lambert*, 98 F.3d 1181, 1186 (9th Cir. 1996), "without regard to [the officers'] underlying intent or motivation," *Graham*, 490 U.S. at 397.

Nothing in the record suggests that the decision to use pepper spray during each of the three protests at issue in this case was a "split-second judgment" made "in circumstances that were 'rapidly evolving.' " *Chew*, 27 F.3d at 1443 (quoting *Graham*, 490 U.S. at 397). To the contrary, the officers testified that the *only* exigency here was the use of the "black bear" lock-down devices. And they further testified that the decision authorizing pepper spray's use on *any* protester using such a lock-down device was made *before* the officers were even called to the scenes of the protests. In light of this evidence, a reasonable fact finder could conclude that the decisions to use pepper spray during each of the protests were not made in the heat of the moment.

v. Severity of the Crime

The evidence in this case suggests that the only crime the protesters had committed when pepper-sprayed was trespass. *Cf. Lamb v. City of Decatur*, 947 F. Supp. 1261 (C.D. Ill. 1996) (holding that it was a jury question whether the use of pepper spray on two thousand, nonviolent, unarmed labor protesters who were exercising their First Amendment rights and whose only crime was trespass and therefore "negligible" was reasonable). Although the commission of a misdemeanor offense is "not to be taken lightly," it militates against finding the force used to effect an arrest reasonable where the suspect

was also nonviolent and "posed no threat to the safety of the officers or others." *Hammer v. Gross*, 932 F.3d 842, 846 (9th Cir. 1991) (holding that the fact that the crime committed was a misdemeanor was a factor that the jury should consider in determining whether the forced used by the arresting officer against a DUI suspect to obtain a blood sample over the suspect's verbal objection was reasonable); *see also Chew*, 27 F.3d at 1442 & n.9 (suggesting that a crime's "severity" in the excessive force context turns on whether it involves violence or an armed suspect).

Indeed, the severity of the protesters' crime and their nonviolent behavior stands in stark contrast to that of the felons on whom the use of pepper spray has been deemed reasonable by other courts. For example, the protesters were not belligerent felons resisting arrest for drunk driving as in *Passino v. State*, 669 N.Y.S.2d 793 (1998) (finding the use of pepper spray to induce cooperation reasonable). Nor were they narcotics suspects on the verge of swallowing contraband as in *United States v. Halloway*, 906 F. Supp. 1437 (D. Kan. 1995) (finding severity of crime and threat of swallowing contraband sufficient to justify use of pepper spray); *Singleton v. City of Newburgh*, 1 F. Supp. 2d 306 (S.D.N.Y. 1998) (same). As these cases illustrate, the use of pepper spray on a suspect is not reasonable simply because the police have the legitimate objective of making an arrest. It is only reasonable if such force is needed to make an arrest in the circumstances. Here, a rational juror could conclude that the protesters' nonviolent misdemeanor offense of trespass did not render pepper spray necessary to effect their arrests.

vi. Alternatives Available

Because the protesters posed no immediate threat to the safety of anyone during the protests, the officers — and the district court in reviewing the reasonableness of their actions — were required to consider "[w]hat other tactics if any were available" to effect their arrest. *Chew*, 27 F.3d at 1443. But,

in reviewing the availability of "other tactics," the district court erred. First, the court simply concluded that the "plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest." To the extent that the court regarded this finding to be determinative, it was mistaken. At most, whether alternatives existed is only a factor to be considered in assessing the need for the force used by the police. *See Alexander*, 29 F.3d at 1367.

Second, plaintiffs presented a great deal of evidence as to alternatives that were available during the protests, including: (a) negotiation; (b) using the Makita grinder or other tools to remove the lock-down devices; (c) physically removing the protesters; (d) and "waiting them out." The court, however, dismissed these alternatives out of hand, resolving all conflicts in the evidence and drawing all inferences therefrom against the plaintiffs. Defendants also presented evidence that they were legitimately concerned about the potential for a grinder's operation to cause a fire or accidental injuries to protesters or to police-operators. Before the protests occurred, defendants concluded that pepper spray was the "safer" tactic for securing the protesters' release from the "black bears." They made this decision despite the officers' extensive training in the use of a Makita grinder and the fact that no injuries had yet occurred when the grinder had been used hundreds of times to remove these lock-down devices.

Given the conflicting evidence concerning available alternatives to pepper spray, the district court should not have directed a verdict in favor of defendants. Where the evidence suggests that "other tactics" were available to the police to effect an arrest, the reasonableness of the force used was for the jury to decide. *Cf. Chew*, 27 F.3d at 1443. The standard governing a court's decision whether to grant judgment as a matter of law does not permit otherwise. *See Anderson*, 477 U.S. at 252.

IV.

In sum, the district court's conclusion that the officers did not use excessive force to effect the arrests of the protesters as a matter of law is untenable given the evidence presented at trial. Whether the officers reasonably needed to apply pepper spray — either with Q-tips to the protesters' eyelids or by short full blasts into their faces — to arrest the protesters was in dispute. It is clear to us that a "fair-minded jury could return a verdict for the plaintiff[s] on the evidence presented." *Id.* The evidence reveals that the "nature and quality of the intrusion" caused by the pepper spray on the protesters' bodily integrity under the Fourth Amendment was more than "minimal," as the district court had concluded. Indeed, the pepper spray caused the protesters "immediate and searing pain," *Forrester*, 25 F.3d at 808 n.5, which the officers could not instantly stop inflicting once the protesters agreed to release themselves from the "black bears." Under the Fourth Amendment, using such a "pain compliance technique" to effect the arrests of nonviolent protesters can only be deemed reasonable force if the countervailing governmental interests at stake were particularly strong. Our analysis of those interests here, however, reveals just the opposite. The protesters posed no safety threat to anyone. Their crime was trespass. The "black bear" lock-down devices they used meant that they could not "evade arrest by flight." *Graham*, 490 U.S. at 396. They were not "menacing" demonstrators seeking to intimidate the police or the public: most were young women; two were minors. Although the "black bear" devices posed an impediment to arrest, they did not render arrest impossible. Alternatives were available. And the use of pepper spray did not hasten the removal of the protesters from the premises, but prolonged the incidents. In these circumstances, the need for the force used during the protests falls far short of supporting a judgment as a matter of law in favor the defendants.

The inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth

Amendment should only be taken from the jury in rare cases. *See Chew*, 27 F.3d at 1443; *Barlow*, 943 F.2d at 1135. This is not such a case. Viewing all the evidence in the light most favorable to the plaintiffs as the nonmoving parties, a rational juror could easily conclude that there was sufficient evidence for a verdict in favor of the plaintiffs. Indeed, the fact that the district judge, after initially declaring a mistrial and ordering a new trial, stated that "reasonable people can differ" on the issue of excessive force in this case speaks directly to the wisdom of our decision now to reverse the court's grant of judgment as a matter of law in favor of the defendants.

V.

A. Qualified Immunity

" 'The doctrine of qualified immunity protects government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Katz v. United States*, 194 F.3d 962, 967 (9th Cir. 1999) (quoting *Somers v. Thurman*, 109 F.3d 614, 616-17 (9th Cir. 1997) (internal quotations omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Sloman v. Tadlock*, 21 F.3d 1462, 1466-67 (9th Cir. 1994) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The determination whether an official is entitled to qualified immunity involves a two-step analysis: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993).

1. Clearly Established Law

"[W]hether the law was clearly established . . . is a pure question of law for the court to decide." *Mendoza v. Block*, 27

F.3d 1357, 1360 (9th Cir. 1994). For a right to be "clearly established," its "contours . . . must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Id.* at 1361 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (alternation in original). Although plaintiffs need not show that the very action challenged was previously held unlawful, they must show that " 'in the light of pre-existing law the unlawfulness must be apparent.' " *Id.* (quoting *Anderson*, 483 U.S. at 640).

Here, the district court correctly ruled that the law concerning the use of excessive force is clearly established.

> It is clearly established that the use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from an unreasonable seizure. The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted.
>
> This analysis applies to any arrest situation where force is used, whether it involves physical restraint, use of a baton, use of a gun, or use of a dog. . . . An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.

Id. at 1362 (internal quotation marks and citations omitted). Thus, even though police use of pepper spray on nonviolent protesters engaged in civil disobedience is unprecedented, Sheriff Lewis and Chief Deputy Sheriff Philp were aware of the law governing its use. Indeed, Sheriff Lewis personally issued Humboldt County Sheriff's Department's general order, which explains the law under *Graham* and its progeny concerning the relevant factors for assessing the limits on police use of force under the Fourth Amendment.

2. Objective Reasonableness

In a civil rights action in which qualified immunity is asserted, the reasonableness of an officer's conduct comes into play both "as an element of the officer's defense" and "as an element of the plaintiff's case." *Katz*, 194 F.3d at 967.

> To determine whether an officer is entitled to the defense of qualified immunity when the use of force is in issue, the question asked is whether a hypothetical officer reasonably could have believed that the amount of force used was reasonable. To resolve the merits of an excessive force claim, the question is whether a reasonable officer could have believed that the force used was necessary under the circumstances. Because of this parity, [this court has] repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.

Id. at 968 (resolving an apparent intracircuit conflict between excessive force cases that equated the inquiry on the merits with the qualified immunity analysis and other cases that suggested the two lines of inquiry are distinct) (internal quotation marks and citations omitted). Whether the trial judge or jury should ultimately decide if an officer is entitled to qualified immunity in a given case "has not been definitely resolved." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1100 (9th Cir. 1995) (citing *Sloman*, 21 F.3d at 1467-69). But where essential historical facts concerning what an official knew or did are in dispute, "it is clear that these are questions of fact for the jury to determine." *Id.* at 1099; *see also Katz*, 194 F.3d at 969 (holding that if disputed facts prevent the court from deciding whether excessive force was used as a matter of law, then the court cannot decide whether officials are entitled to qualified immunity for the use of that force as a matter of law either).

Here, because historical facts are in dispute concerning "the amount of force used" and "the circumstances that might justify the amount of force used," *id.*, the district court erred in granting qualified immunity to Sheriff Lewis and Chief Deputy Sheriff Philp as a matter of law. The disputed facts concerning the amount of force used here include: (1) whether the pepper spray was uniformly applied to closed or open eyes; (2) whether the applications of OC with a Q-tip were necessary; (3) whether full blasts of OC sprayed onto the protesters' faces were necessary and executed at a safe distance; (4) whether the application of water by spray bottle to the protesters' eyelids and faces exacerbated the pain caused by the pepper spray or actually provided relief from the OC; and (5) the nature and extent of pain and emotional trauma caused by the Q-tip applications and the full blast spray applications.

The disputed facts concerning the circumstances justifying the use of force include: (1) the severity of the crime committed; (2) the danger, if any, posed by the protesters to the public and to the police; (3) whether use of a lock-down device constituted "active resistance" to arrest; (4) whether protesters other than those in lock-down devices posed any threat to the police or the public; (5) whether negotiation, "waiting them out," physically carrying the protesters out, and using the Makita grinder constituted viable and reasonable alternatives; and (6) whether any other exigencies were present to justify applying pepper spray with a Q-tip to the protesters' eyelids and again by full spray blasts into their faces.

In addition, Sheriff Lewis's and Chief Deputy Sheriff Philp's individual liability is not just based on the determination whether the use of pepper spray constituted excessive force under the circumstances. Their individual liability to the plaintiffs is also based on the extent to which they:

> "set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which [they] knew or reasonably should have

> known, would cause others to inflict the constitutional injury." A supervisor can be liable in his individual capacity "for his own culpable action or inaction in the training, supervision, or control of his subordinates; [or] for his acquiescence in the constitutional deprivation . . . ."

Watkins v. City of Oakland, 145 F.3d 1087, 1093 (9th Cir. 1998) (quoting *Larez*, 946 F.2d at 645). Thus, if what they knew and did when they authorized the use of pepper spray on nonviolent protesters is in dispute, their entitlement to qualified immunity cannot be decided as a matter of law by the court. *See Sinaloa*, 70 F.3d at 1099-1100.

Here, much of what Lewis and Philp knew and did is in dispute. For example, Philp testified that in authorizing pepper spray to be used on the protesters, he specifically "told [the officers that he] did not want them to give a full face blast, that [he] wanted them to avoid the direct application to the nose and mouth area, keep it up in the area on more a limited basis and that they were not to apply it [in] close proximity to the open eyeball." Yet, the officer in charge during each of the protests testified that Philp and Lewis authorized full spray blasts of OC, not just Q-tip applications. The officer who applied the pepper spray to the protesters also testified that Philp never instructed him on whether the pepper spray could or should be reapplied, how often, at what intervals, or under what circumstances.

In addition, Lewis and Philp testified that they consulted with the district attorney about the legality and advisability of pepper spray's use on nonviolent protesters. But the district attorney expressly limited his opinion to the issue of criminal liability for an unspecified use of pepper spray, advised that he could not opine as to civil liability, and recommended that defendants obtain a separate opinion about civil liability before using the pepper spray.

Lewis also testified that prior to the incidents in this case, he and the County risk manager "discussed the lock devices, what we were encountering and [I] shared with her the concept of the Q-tip application of pepper spray." But the risk manager's testimony contradicts this. She testified that she could not recall a conversation with Philp, Lewis, or any other police official *before* the incidents at issue concerning the use of OC by Q-tips on nonviolent protesters. She did recall a conversation with Lewis, however, that occurred about a week before the Scotia protest, which was very brief and took place in the hallway outside her office. During that conversation, she spoke with Philp about a specific incident and the possibility of using OC on protesters who locked-down by using concrete, instead of using jackhammers to remove the concrete.

Moreover, when Lewis and Philp authorized their officers to use the pepper spray on the plaintiffs, although they fully reviewed the law and consulted then-current literature on law enforcement's tactical use of pepper spray, they both admitted knowing that: (1) the California Department of Justice had only approved the use of pepper spray on "hostile or violent" subjects; (2) the California Highway Patrol's use of force policy specifically prohibits the use of pepper spray as it was used here; and (3) pepper spray had never before been used in this manner in Humboldt County, the State of California, or anywhere in the nation. They also conceded that Humboldt County's only written policy statement on the proper use of pepper spray described it as a "defensive weapon," only to be used in "attempting to subdue an attacker or a violently resisting suspect, or under other circumstances which under the law permit the lawful and necessary use of force . . . by . . . chemical agent."

Defendants contend that the use of pepper spray here falls under the category of "other circumstances which under the law permit the lawful and necessary use of force . . . by . . . chemical agent." The determination whether that is correct is

inextricably linked with the factual question whether the use of pepper spray in this case constituted excessive force. Therefore, under Rule 50, the district court should not have granted defendants' motion for judgment as a matter of law on qualified immunity grounds.

In sum, because historical facts were in dispute concerning the reasonableness of the use of pepper spray in this case, as well as what Lewis and Philps knew and did when they authorized its use, the district court erred in deciding that these officials were entitled to qualified immunity as a matter of law.

VI.

Accordingly, we REVERSE the district court's decisions to enter judgment as a matter of law for defendants Humboldt County and its Sheriff's Department and the City of Eureka and its police department and to dismiss Sheriff Lewis and Chief Deputy Sheriff Philp on the basis of qualified immunity. We REMAND this action for a new trial in accordance with the views herein expressed.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
For the Northern District of California

No. C-97-3989-VRW

HEADWATERS FOREST DEFENSE, et al.,
Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,
Defendants.

Oct. 26, 1998.

ORDER

WALKER, District J.

The jury in the above action was unable to reach a verdict and, as a result, the court declared a mistrial. After a careful review of the evidence and applicable law, it is apparent that there is a more serious problem here than a disagreement among jurors as to the proper outcome of the case. For the reasons that follow, the court concludes that plaintiffs' claims are legally untenable and that the court must grant defendants' motion for a directed verdict pursuant to FRCP 50(b). The court reserved ruling on this motion at the close of the plaintiffs' case and at the close of evidence.

I

As a preliminary matter, the court notes that the jury's inability to reach a verdict does not necessarily indicate that reasonable minds could differ or that plaintiffs have introduced substantial evidence to support their claims. See *Demaine v. Bank One*, 904 F.2d 219, 220 (4th Cir. 1990) (deadlocked jury does not prevent entry of a directed verdict under Rule 50); *Noonan v. Midland Capital Corp.*, 453 F.2d 459, 462 (2d Cir. 1971) (deadlocked jury does not mean that the disagreement is fair and reasonable); *City and County of Honolulu v. Hawaii Newspaper Agency*, 559 F.Supp. 1021, 1026 (D. Hawaii 1983) (court may grant judgment as a matter of law following a mistrial due to a deadlocked jury). If the existence of some jurors favoring one party were enough to establish a legitimate controversy, no court could ever grant a renewed motion for a judgment as a matter of law following a verdict or a hung jury. Both, however, are commonplace and both are envisioned by FRCP 50(b).

Under FRCP 50, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All credibility determinations, weighing of evidence and drawing of inferences from the evidence are jury functions. *Anderson*, 477 U.S. at 253. Hence, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* If, however, there is "no substantial evidence" to support the non-moving party's claim, the court must grant judgment as a matter of law. *California Computer Products v. IBM*, 613 F.2d 727, 733 (9th Cir. 1979).

II

The present litigation arises out of three incidents that occurred in September and October of 1997 during which aerosol oleoresin-capsicum (OC) was applied to self-described "locked-down" demonstrators. In each of the three incidents, the demonstrators trespassed on private property and locked themselves together with steel devices known as "black bears." The black bears used in these incidents consist of two steel cylinders. One end of each cylinder is cut at a forty-five degree angle and welded to the other cylinder to form a right angle. A section of steel rod is welded into the center of the cylinders at or as close as possible to the right angle. The trespassers attached their wrists inside the black bears by using a steel bracelet that they clipped to the steel rod. The trespassers thereby managed to link themselves arm to arm and effectively resist arrest.

At trial, videotape footage taken by the Humboldt County Sheriff's Department and live testimony established the following:

On September 25, 1997, at the offices of Pacific Lumber Co., eight trespassers entered the building and locked themselves together in a circle. Among these trespassers were plaintiffs Vernell Lundberg, Jennifer Schneider, Molly Burton and Eric Neuwirth. In response to this intrusion, employees of Pacific Lumber called the police and several sheriff's deputies responded. While plaintiffs chanted slogans and sang songs, Sergeant Ciarbellini and Deputy Held discussed the possibility of using a Makita grinder to cut plaintiffs out of their steel bindings, but decided that the use of OC was the safest and quickest means of effecting arrest.

After repeatedly pleading with plaintiffs, asking them to release and warning them that if they did not comply

OC would be applied, the officers began to use cotton swabs to apply a small amount of liquid OC to the outside corner of the plaintiffs' closed eyes. Before applying OC to each individual plaintiff, the deputies again pled with the individual, asking him or her to release. Only after the individual renewed his or her refusal to cease resisting arrest did the deputies apply OC. After the first application, the deputies proceeded to apply a second application of OC to those plaintiffs who did not release. Ultimately all but two plaintiffs released; these two were carried outside and cut free using a Makita grinder. Plaintiffs introduced no evidence of a risk of physical injury or actual physical injury resulting from the use of OC at this incident.

On October 3, 1997, again on Pacific Lumber property, plaintiffs Michael McCurdy and Noel Tendick locked themselves together through the treads of a Caterpillar tractor. The responding deputies determined that the risk of injury and fire mandated that OC be used before attempting to cut plaintiffs out. The deputies warned the trespassers that if they did not release, OC would be applied. After waiting for a short period of time, the deputies renewed their warning, requested that plaintiffs release, and then proceeded to apply OC by swabbing the outside corner of plaintiffs' closed eyes. The deputies then waited for a few minutes before again requesting that plaintiffs stop resisting arrest, this time warning that a direct spray of OC would be applied. Plaintiffs again refused to release and the deputies proceeded to spray OC in a single pass across plaintiffs' closed eyes. Plaintiffs still refused to release and ultimately had to be cut free from the tractor using the Makita grinder. Plaintiffs introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC at this incident.

The third incident, on October 16, 1997, occurred in the offices of Congressman Frank Riggs. Here the four trespassers, plaintiffs Terri Slanetz, Lisa Sanderson-Fox, Maya Portugal and Jennifer Schneider, locked themselves in a circle around a tree stump after dumping wood shavings onto the floor. The responding officers decided that risk of injury and fire mandated that they first attempt to gain compliance by applying OC. The officers repeatedly warned the plaintiffs of their intention to use OC and requested that plaintiffs stop resisting arrest. Plaintiffs refused to comply. The deputies applied OC to plaintiffs' eyes. This time, however, officers swabbed across the eyelid, inside corner to outside corner. Maya Portugal, alone among the plaintiffs, testified that the cotton swab came into contact with the surface of her eye. This is not apparent from the video footage. After the first application, two plaintiffs continued to resist arrest. One of the deputies repeated his request that plaintiffs release and warned that he intended to apply a spray of OC if the plaintiffs did not comply. Upon plaintiffs' refusal to cooperate, the deputy directed a single spray across the eyes of plaintiff Terri Slanetz and obtained her release. Plaintiffs again introduced no evidence of a significant risk of physical injury or actual physical injury resulting from the use of OC at this incident.

In each of these incidents the deputies applied water from a spray bottle, in some cases before the plaintiffs released, in order to limit the discomfort caused by the pepper spray.

III

It is undisputed that plaintiffs were subject to lawful arrest and that the officers were obligated to complete the arrests and remove plaintiffs. Furthermore, it is undisputed that the officers were acting pursuant to and in conformity with the defendants' policies. The sole question, therefore, is whether the officers used excessive force in effecting plaintiffs' arrest.

The Fourth Amendment prohibits use of excessive force during the seizure of a free citizen. See *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). Accordingly, even when an officer has probable cause to seize an individual, the officer must employ a reasonable amount of force when effecting that seizure.

The issue of "[w]hether the amount of force used was reasonable is usually a question of fact to be determined by the jury." *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). Numerous courts, however, have decided the issue as a matter of law. See, e.g., *Forrett v. Richardson*, 112 F.3e 416 (9th Cir. 1997) (use of deadly force against violent fleeing suspect held reasonable as a matter of law); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996) (shooting of erratic armed suspect found reasonable as a matter of law); *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990) (force used to subdue pretrial detainee found reasonable as a matter of law); *Palacios v. City of Oakland*, 970 F.Supp. 732, 740 (N.D. Cal. 1997) (shoving suspect found reasonable as a matter of law); *Denney v. Takaoka*, 1993 WL 96602 (N.D. Cal. 1993) (pain compliance hold found reasonable as a matter of law).

Accordingly, this court must determine whether a verdict finding excessive force would in this case be "sup-

ported by the evidence, that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

When determining whether the force used to effect a seizure was "reasonable," courts must carefully balance the competing interests of the individual and the government. See *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

> Determining whether the force is used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a carefully balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake* * *. [T]he reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them.

Id., 490 U.S. at 396-7 (internal quotations omitted). "The question is not simply whether the force was necessary to accomplish a legitimate police objective; it is whether the force used was reasonable in light of *all* the relevant circumstances." *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (en banc).

The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs.

First, the severity of the intrusion upon the arrestees' personal integrity was minimal. The officers did not threaten or use deadly force or even employ a significant level of physical force. Rather, the force used was merely the infliction of transient pain without signifi-

cant risk of physical injury. In fact, plaintiffs failed to introduce any evidence that the use of cotton swabs to apply OC posed any risk of injury.

The testimony introduced regarding the risk of injury posed by spraying OC (the so-called "hydraulic needle effect") was ambiguous at best. RT Vol 9 at 160. In addition, the testimony established that this risk was "protected against" by closing of the eyes, which of course was the state of the relevant plaintiff's eyes when sprayed. Furthermore, the Constitution does not require law enforcement officers to avoid every conceivable risk in effecting lawful arrest. The negligible risk, if any, associated with OC spray as used by defendants cannot be deemed sufficient to render the defendants' use of force unreasonable.

Second, the officers had a strong and legitimate interest in quickly removing the trespassing plaintiffs. In each incident, plaintiffs were part of a large group of protestors operating in an organized and concerted effort to invade private property, obstruct business and hinder law enforcement. Although these crimes are misdemeanors, "[t]he wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of citizens." *Bray v. Alexandria Woman's Health Clinic*, 406 U.S. 263, 287, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (Kennedy, J. concurring). Here, the officers had a substantial interest in preventing the organized lawlessness of plaintiffs, in protecting the property rights of the lawful occupants and in returning to the officers' primary duties.

Third, plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest. Rather, plaintiffs merely suggested that the officers ought to have (1) used the Makita grinder to cut plaintiffs free, (2) used a manual mechanical pipe-cutter to cut plaintiffs free; or (3) used further negotiations or "waited plaintiffs out."

In the past, defendants have used, without serious injury, a Makita grinder to cut through black bears and effect the arrest of locked-down protestors. This device employs an abrasive blade that spins at extremely high speeds enabling it to cut through steel. Defendants introduced uncontroverted testimony that use of such a cutting device poses a substantial risk of injury to both locked-down ptotestors and the operating officer. The mere fact that the Makita grinder has been used in the past without inflicting injury does not establish that it is less dangerous than the use of OC. In addition, officers gave uncontroverted testimony that the spray of sparks that result from operation of the grinder can and did present a significant risk of fire at each incident. The officers, before exposing plaintiffs to the threat of serious physical injury by cutting them out, opted instead to use first a pain compliance technique that posed no significant threat of physical injury to anyone present at the scene. No reasonable juror could conclude that this decision was unreasonable.

As an alternative to the Makita grinder, plaintiffs produced a manual pipe cutting device. This device was not offered into evidence, however, and was met with uncontroverted testimony that such a device was considered and rejected by the defendants. The uncontroverted evidence established that such a device would be totally ineffective due to (1) its ungainly proportions and opera-

tion, (2) its inability to cut close enough to the right angle of the black bear to allow access to the clip, and (3) its inherent tendency to leave extremely sharp edges resulting in a significant risk of injury. The officers' decision not to use such a device was unquestionably reasonable.

Finally, plaintiffs suggested that the officers ought to have further negotiated with plaintiffs or otherwise attempted to "wait them out." This suggestion ignores plaintiffs' own testimony that they had no interest in negotiating and intended to remain locked-down as long as possible. Indeed, plaintiffs testified that the purpose of their trespass was to disrupt the lawful occupants' use of their property for the maximum extent of time. Plaintiff Portugal went so far as to assert that the need to use a restroom was not an obstacle to remaining in the lock down devices indefinitely. Furthermore, plaintiffs' suggestion that the deputies ought to have waited plaintiffs out ignores the fact that the plaintiffs were unlawfully trespassing on private property and that their presence was an intentional and *continuing* intrusion on the rights of the lawful occupants.

In addition, police officers are not required to use the lease intrusive degree of force possible. Rather, as stated above, the correct inquiry is whether the force that was used to effect a particular seizure was objectively reasonable, viewing the facts from the perspective of a reasonable officer on the scene. See *Graham,* 490 U.S. at 396; *Forrester v. City of San Diego,* 25 F.3d 804, 807-8 (9th Cir. 1994). Whether officers hypothetically could have used less painful, less intrusive or more effective force in executing an arrest is simply not the issue.

The videotape evidence demonstrates that, after the plaintiffs ignored the officers' *repeated* pleas to stop

resisting arrest and warnings regarding the use of OC, the officers used controlled applications of OC in a manner designed to minimize exposure. Although the officer applying OC to Maya Portugal may have inadvertently touched the surface of her eye, no evidence was introduced by plaintiffs indicating that such contact was harmful or intentional. And, to the contrary, the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes. This court need not, therefore, consider whether an application of OC to the surface of the eye, if intentional, would constitute excessive force.

The use of pain compliance to gain the cooperation of a resisting arrestee has been repeatedly recognized as reasonable force. See, e.g., *Forrester*, 25 F.3d 804; *Eberle*, 901 F.2d 814; *Denney v. Takaoka*, 1993 WL 96602. Furthermore, several courts have specifically held that the use of OC as a pain compliance instrument, rather than as a means of subduing an attacking or violent suspect, is reasonable as a matter of law. See, e.g., *Monday v. Oullett*, 118 F.3d 1099 (6th Cir. 1997); *Bennet v. Cambra*, 1997 WL 88329 (N.D. Cal.); *United States v. Holloway*, 906 F.Supp. 1437 (D. Kan. 1995); *Passino v. State of New York*, 175 Misc.2d 733, 669 N.Y.S.2d 793 (Court of Claims 1998). Here, nothing in the officers' use of OC supports a conclusion that they acted unreasonably. Plaintiffs have introduced no evidence to the contrary and no reasonable juror could conclude otherwise.

Giving full credence to plaintiffs' factual testimony and to the reasonable inferences flowing from that evidence, this court concludes that, on the record of the case as tried and presented, there is no reasonable basis for jurors to find that the officers' use of OC was object-

ively unreasonable in light of the facts and circumstances confronting them.

IV

In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law that neither the offices nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights. This renders moot the question whether the city and county policies authorized the use of constitutionally excessive force. See *Forrester*, 25 F.3d at 808 (" 'If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.' ") (quoting *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)). Judgment must, therefore, be entered for defendants as a matter of law.

IT IS SO ORDERED.

JUDGMENT.

The action came on for trial before the court and a jury, the Honorable Vaughn R. Walker presiding. Plaintiffs having been fully heard, for the reasons stated in the accompanying order, there is no reasonable basis for jurors to find that the officers' use of OC was objectively unreasonable in light of the facts and circumstances confronting them.

In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law

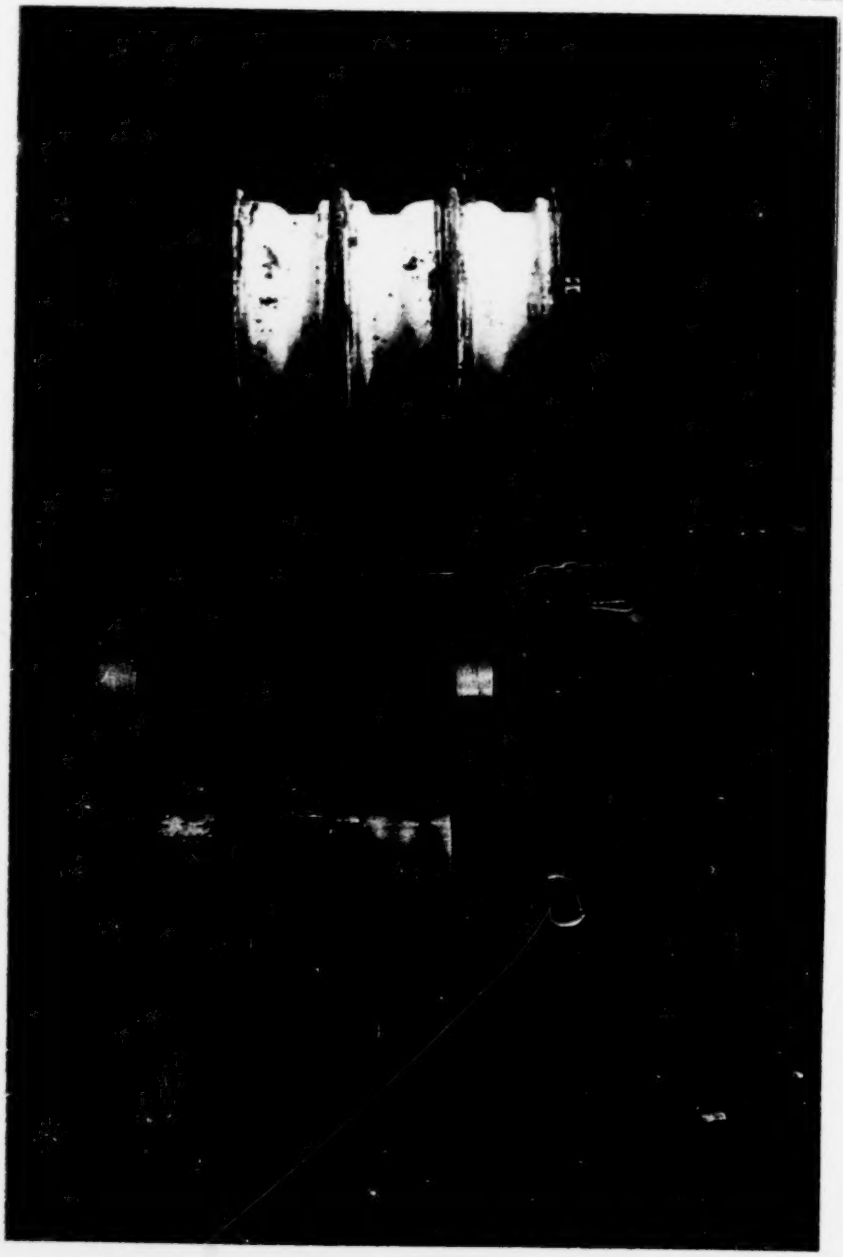
that neither the offices nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights. This renders moot the question whether the city and county policies authorized the use of constitutionally excessive force. See *Forrester,* 25 F.3d at 808 (" 'If a person has suffered no constitutional injury at the hands of the individual officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.' ") (quoting *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986)). Defendants' FRCP 50(a) motion for judgment as a matter of law is, therefore, GRANTED.

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of the plaintiffs their costs of action.

- END OF DOCUMENT

APPENDIX E

EVOLUTION OF LOCKDOWN DEVICES
(Trial Exhibit N-1, U.S.D.C. (N.D. Cal.) No. C-97-3989-VRW)
(originally Appendix C to the First Petition for Writ of Certiorari)



APPENDIX F

CROSS-SECTION VIEW OF LOCKDOWN DEVICE
(Trial Exhibit N-8, U.S.D.C. (N.D. Cal.) No. C-97-3989-VRW)
(originally Appendix D to the First Petition for Writ of Certiorari)

APPENDIX G

USE OF LOCKDOWN DEVICES - SCOTIA
(Trial Exhibit N-20, U.S.D.C. (N.D. Cal.) No. C-97-3989-VRW)

REFERENCE TO LODGINGS

– Lodging I – Videocassette of Scotia Arrests
Previously lodged on April 30, 2001,
Case No. 00-1649

– Lodging II – Videocassette of Vernell "Spring"
Lundberg Interview, Previously lodged on
April 30, 2001, Case No. 00-1649